SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 7 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-296

LAWRENCE S. HUFFMAN, As Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, as Sheriff of Allen County, Ohio,

Appellants,

v.

PURSUE, LTD.

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR APPELLANTS

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Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR APPELLANTS

Appellants appeal from the judgement of the United States District Court for the Northern District of Ohio, Western Division (Celebrezze, Circuit Judge, and Young and Walinski, District Judges), entered on April 20, 1973, holding Ohio Revised Code Sections 3767.04 and 3767.06 to be unconstitutional and enjoining appellants herein from executing that portion of the Allen County Common Pleas Court's final judgment of Nov. 30, 1972, in *State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota et al*, Court of Common Pleas of Allen County, Ohio, Case Number 72 CIV 0326,

which ordered the closing of the Cinema I Theatre at 69 Public Square, Lima, Ohio "for a period of one year unless sooner released by order of (the Common Pleas) Court pursuant to the defendant-owners fulfilling the requirements provided in Section 3767.04 of the revised Code of Ohio".

OPINION BELOW

The opinion of the District Court for the Northern District of Ohio, Western Division, has not been reported. A copy of the Opinion and Order, as filed on April 20, 1973, is reprinted in the Appendix at pages A3-11.

JURISDICTION

On Dec. 1, 1972, Appellee corporation filed an action in the United States District Court for the Northern District of Ohio, Western Division, entitled *Pursue, Ltd., v. Lawrence S. Huffman, in his capacity as Prosecutor of Allen County, Ohio and Edward Fair, in his capacity as Sheriff of Allen County, Ohio*, CIV 72-432, alleging a Civil Rights cause of action under 42 U.S.C. Sections 1983 and 1985, together with motions for a temporary restraining order, preliminary and final injunction, and an application for a 3-judge court. On Dec. 11, 1972, the Sixth Circuit Court of Appeals designated Circuit Judge Anthony J. Celebrezze, and District Court Judges Nicholas J. Walinski and Don J. Young as members of the Three-Judge District Court, which on April 20, 1973, handed down the aforementioned opinion and order.[1] A

[1]On June 1, 1973, Appellants Huffman and Fair petitioned this Court for a Writ of Mandate or Prohibition in Huffman et. al v. The United States District Court for the Northern District of Ohio, Western Division et al, No. 72-1613 and also made application to Justice Potter Stewart for a stay order or writ of injunction and an order to advance the date set for filing of briefs in opposition to the petition. On June 25, 1973, both matters were referred to the Court as a whole and denied in Huffman et al v. U.S. District Court for The Northern District of Ohio, et al ___ U.S. ___, 37L.Ed2d 1039, ___S.Ct. ___ (June 25, 1973). On September 18, 1973, this Court requested that a response be filed by the Respondents, Solicitor General of the United States and Pursue Ltd. In their brief responses, such parties took the position that

Notice of Appeal was filed in the United States District Court on May 14, 1973 and the Jurisdictional Statement was filed on August 14, 1973. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C. Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Bailey v. Patterson*, 369 U.S. 31, 34, 7 L.Ed. 2d 512, 82 S.Ct. 549 (Feb. 26, 1962).

QUESTIONS PRESENTED

1. Whether the doctrine of lis pendens barred Pursue Ltd., as the assignee of the leasehold interest in 69 Public Square, Allen County, Ohio, from prosecuting the within Civil Rights Action, *Pursue Ltd. v. Huffman et al*, 72 Civ. 432 where (a) the complaint of Pursue Ltd. demonstrates on its face that, on the day prior to such federal filing, a final judgment had been entered against the assignor in a state court action, forfeiting such leasehold interest for a year, and (b) Pursue Ltd. had actual and constructive notice of the state court litigation at the time it acquired its leasehold interest by assignment.

2. Whether, under the mandatory provisions of 28 U.S.C. section 2283, the three-judge federal district court acted in

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the "Jurisdictional Statement (subsequently filed on August 14, 1973) is in essence identical to the petition for Writ of Mandamus or Prohibition with regard to the substantive issues," and urged denial on that ground. See pages 8 and 13 of Response In Opposition of Pursue Ltd., filed with this Court on or about Nov. 2, 1973. Ten days later, this Court denied the Motion for leave to file a petition for writ of mandamus and/or prohibition. Huffman et al. v. U.S. District Court for the Northern District of Ohio et al, ___U.S.___, 38 L.Ed.2d 325, ___S.Ct.___ (Nov. 12, 1973). Appellants would question the correctness of such responses and submit that the cases differ materially in that the "record" which would be before the Court in an original Petition for Writ of Mandate pleading in 72-1613 would not be as sparce as the "record" in Pursue Ltd. v. Huffman et al., 72 Civ. 432, being the equivalent of that which, by stipulation of the parties, was filed as the Appendix herein. Further, the issue of federal interference is more forcefully brought to this Court's attention by the Statement of Facts in the Petition for Writ of Mandate. See Statement of the Case, infra, at page 5.

excess of its jurisdiction when it enjoined appellants from executing that portion of the Allen County Common Pleas judgment of Nov. 30, 1972, which ordered the closing of the theater, where the subject real estate was at that time in custodia lex in *Ohio ex rel. Huffman v. Dakota*, 72 Civ. 0326, an "in rem" state court public nuisance abatement action.

3. Whether it was the intent of Congress, in enacting the Civil Rights Act of 1871 (42 U.S.C. section 1983 and 1985), to authorize a federal cause of action, where the state action as to which relief is sought is an "in rem" civil action by the Prosecuting Attorney to abate a public nuisance located upon real property within his County.

4. Whether the three-judge federal district court erred in failing to grant appellants' motion to dismiss the Civil Rights Complaint and dissolve the temporary restraining order, where:

(a) the Pursue Ltd. Complaint failed to plead the highly specific facts necessary to state a Civil Rights Cause of Action, and

(b) the Pursue Ltd. Complaint, in pleading by reference the nature of the assignor's (Dakota) course of conduct (which appellant had specifically alleged and proved in the State Court action) showed a general disability to state a claim upon which federal relief could be granted, and where

(c) the affidavits in support of appellants' motion to dismiss showed the Pursue Ltd. Complaint to be a sham pleading, brought in bad faith and to perpetuate a fraud on the Court.

5. Whether the pleadings on file in the federal district court failed to raise a substantial federal question for the invocation of a three-judge federal district court to consider the constitutionality of the Ohio Nuisance Statute.

6. Whether the pleadings on file in the federal district court provided a basis for equitable jurisdiction and federal intervention under the principles expressed by this Court in *Younger v. Harris et al.*, *Mitchum v. Foster*, or *Steffel v. Thompson*.

7. Whether Sections 3767.04 and 3767.06 of the Ohio Revised Code are constitutional on their face and as applied to the conduct of the appellees by the Allen County Common Pleas Court, in *Ohio ex rel. Huffman v. Dakota*, 72 Civ. 0326.

STATUTORY PROVISIONS INVOLVED

The Ohio Nuisance Statute entitled "Disorderly Houses" being sections 3767.01 through 3767.11 of the Ohio Revised Code, is reprinted in the Appendix, page B1-10.

STATEMENT OF THE CASE

The arguments presented hereinafter should be judged in the light of two dominant issues which are brought into focus by the statement of facts which follow:

1. The question of interference by Federal Courts in state judicial proceedings dealing with obscenity matters, and the emergent condition presently existing in state obscenity law enforcement as a result thereof, and

2. The question of the constitutionality of Ohio Revised Statutes 3767.01 et seq. which treats obscenity as a public nuisance and authorizes the application of the traditional remedy of judicial abatement.

Appellants submit that the former of these two issues - federal interference - is, by far, the more important; yet the appellate vehicle herein, under which that issue is being examined (an appeal from the judgment of a three-judge federal district court in a civil rights case, *Pursue v. Huffman, et al.*, C72-432, only partially tried and on a record whose scope was limited by the trial court rulings) is less than adequate to focus on this major problem. The original "record" which was transmitted to this Court by the U.S. Court of Appeals for the Sixth Circuit in *Pursue, Ltd. v. Huffman, et al.* C72-432, constitutes only a small part of the total record and battery of federal cases which were actually before that Court as a result of Appellee's "volley ball" offensive which succeeded in transferring to the Federal District Court *every* state court proceeding which attempted to deal with the obscenity pro-

blem at the Cinema I Theatre. As already suggested to this Court under the heading "Jurisdiction" (see Footnote 1, at page 2), the true flavor of such Federal interference can only be sensed through a consideration of an original pleading, such as on a petition for writ of mandate, which would allow the records in each of the separate cases to be tied together in one package. While this Court has ruled on Appellants' application for leave to file a petition for writ of mandate in a manner which prevents that consideration, still such pleadings and records which were before the Federal District Court in other related cases have, by stipulation of counsel herein, been made a part of the Appendix filed in this case, for such use as this Court might deem appropriate.

Appellants submit that such matters are not entirely outside the record of this appeal. While, at first blush, one might question the reference to such matters as *State of Ohio ex rel Huffman v. Dakota*, 72 CIV 0326 (see Appendix at pages C-3 through C-14), as not being a part of the record transmitted in *Pursue, Ltd. v. Huffman*, C72-432, still an examination of Appellants' statement of facts show such pleading to be a matter which this Court should consider. (See Footnote 3, at page 20). Even were this Court to disregard everything in the Appendix which is not contained within the original record which was transmitted to this Court by the U.S. Court of Appeals for the sixth Circuit in *Pursue, Ltd. v. Huffman*, C72-432, still there is enough evidence of federal interference in the record to retain that as the primary issue in this case. It cannot be denied that the three-judge Federal District Court, acting as it did *before* the Ohio Supreme Court had an opportunity to rule on the application of the Ohio Statute to the course of conduct presented by the pleadings in *State of Ohio ex rel Huffman v. Dakota*, C72-0326, and the dismissal by the three-judge Federal District Court of that state case upon its removal to the Federal District Court after entry of final judgment in the State Court actually *prevented* the Appellate Courts in Ohio from passing on that issue by way of appeal. See Point VI C infra. Compare this result with the result ob-

obtained in *Art Theatre Guild, Inc. v. Ohio ex rel Ewing* presently before this Court in No. 73-1973, wherein Ohio Revised Statute 3767.01 et seq. was construed by the Ohio Supreme Court in the context of a single film rather than a continuous course of conduct as was pleaded by Appellants herein in *Ohio ex rel Huffman v. Dakota*, 72 CIV 0326.

STATEMENT OF FACTS

On September 18, 1972, at 1:06 P.M., appellant Lawrence S. Huffman, as prosecuting attorney of Allen County Ohio, filed a complaint in the Court of Common Pleas of Allen County, Ohio, entitled "State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota, et al. Case No. 72 CIV 0326," seeking the abatement of the Cinema I Theatre located at 69 Public Square, Lima, Ohio, as a public nuisance. A copy of said complaint is reprinted in the Appendix at pages C3-14. Such action was commenced pursuant to Section 3767.03 of the Ohio Revised Code (see Appendix at page B-3.) At the same time, appellant Huffman filed his Motion for Temporary Injunction, a copy of which is reprinted in the Appendix at pages C15-17.

The Court of Common Pleas assigned appellant Huffman's Motion for Temporary Injunction in State of Ohio ex rel *Huffman v. William H. Dakota* for September 26, 1972, at 9:30 A.M. A copy of said Notice for Hearing is reprinted in the Appendix at page C18. . On the same date, the Clerk of the Common Pleas Court issued a subpoena duces tecum addressed to William H. Dakota and John Does 1 and 2, requiring them to appear and testify on behalf of the plaintiff in said action and to bring with them the 21 motion picture films listed below which were exhibited at that theatre during the dates indicated:

"Man and Wife" July 12-18, 1972

"Hollywood Babylon", "Down and Dirty", and Previews	July 19-23, 1972
"The Hangup", "The Cutthroats", and Previews	July 25-Aug. 1, 1972
"Wow, Its Cindy", "Hot Spurs", and Previews	Aug. 2-8, 1972
"Prostitution, Pornography, U.S.A." "Oddly Coupled" and Previews	Aug. 9-15, 1972
"Sandra, The Making of a Woman", "Diamond Stud" and Previews	Aug. 16-22, 1972
"Midnight Plowboy", "Tobacco Roody" and Previews	Aug. 23-29, 1972
"The Blue Hour" "The Grabbers" and Previews	Aug. 30-Sept. 5, 1972
"Sweet Georgia", "The Exotic Dreams of Casanova" and Previews	Sept. 6-12, 1972
"Marriage Manual", "Love Under 17", and Previews	Sept. 13-18, 1972
"The Pig Keeper's Daughter", "Please Don't Eat My Mother", and Previews	Sept. 19-25, 1972

A copy of said Subpoena Duces Tecum is reprinted in the Appendix at pages C19-21.

On September 18, 1972, at approximate 2:40 P.M., a deputy sheriff personally served a summons and copies of the Complaint, Motion for Temporary Injunction, Notice for Hearing, and Subpoena Duces Tecum on the following persons at the Cinema I Theatre, 69 Public Square, Lima, Ohio:

John Doe No. 1, later identified as John Brownell; and

John Doe 2, later identified as Robert Smith;

Also served with the documents aforementioned, with the exception of the subpoena duces tecum and in lieu thereof, a subpoena, were John Doe 3, later identified as Allen R. Brown, and Jane Doe No. 1, later identified as Geraldine Scott. At the time of the service of these documents, John Brownell was the projectionist at the Cinema I Theatre; Robert Smith was the person in charge of said theatre in the absence of the manager, William H. Dakota; Allen R. Brown was the ticket taker and Geraldine Scott was the ticket seller.

On the evening of Sept. 18, 1972, William H. Dakota was served with a summons and copies of the Complaint, Motion for Temporary Injunction, Notice for Hearing, and Subpoena Duces Tecum at the Cinema I Theatre, No. 69 Public Square, Lima, Ohio.

The owners of the premises, also named as defendants in appellant Huffman's abatement action, were subsequently served with process.

On Sept. 20, 1972, appellant Huffman filed an amended complaint in the Court of Common Pleas and thereafter copies of the Amended Complaint were served upon all of the persons previously served as aforementioned. A copy of the Amended Complaint is reprinted in the Appendix at pages D3-10.

On Sept. 26, and Sept. 27, 1972, the Court of Common Pleas of Allen County, Ohio, convened a hearing on appellant Huffman's Motion for Temporary Injunction in State of Ohio *ex rel Huffman v. William H. Dakota et al.* at which time, the defendants in the abatement action were present and

represented by counsel. Evidence was presented, including the viewing by the Court of four motion picture films which had been subpoenaed, entitled "Love Under 17", "Marriage Manual", "The Pig Keeper's Daughter", and "Please Don't Eat My Mother," and previews of coming attractions. At the conclusion of the presentation of evidence on Sept. 27, 1972, the court ordered that the matter be continued to Oct. 2, 1972, at which time additional evidence was presented by both the plaintiff and the defendants, after which the parties rested. At no time did the defendants offer any evidence to the court that the nuisance complained against had been abated. The Court took the matter under advisement and announced that a decision on the temporary injunction would be made forthwith.

On Oct. 24, 1972, the Court of Common Pleas of Allen County, Ohio, announced its decision in State of Ohio *ex rel Huffman v. William H. Dakota et al*, and journalized its order. A copy of such order is reprinted in the Appendix at pages E3-5. In its order the Court made the following findings: 1. That a nuisance exists as alleged at the Cinema I Theatre, 69 Public Square, Lima, Ohio, which should be abated forthwith: 2. That the realty is owned by the defendants Leland Samuel Collins, Flora Mary Collins Moor, and Sara Lee Collins Wallace; and 3. That William H. Dakota is the person in charge of said theatre and is maintaining said nuisance, and that the defendants Smith, Brown, Brownell and Scott are employed at said theatre. The court ordered the Cinema I Theatre closed, restrained the defendants from removing or in any manner interfering with personal property and contents of the premises at Cinema I Theatre until further order of the Court and ordered the officer serving the Court's order to forthwith make and return into court an inventory of the personal property and contents situated in the building and used in conducting or maintaining the motion picture projection and screening therein. The Court also ordered the defendants to show cause, if any they can, why the closing order should not be made permanent as of that date.

The premises known as Cinema I Theatre, 69 Public Square, Lima, Ohio, was closed pursuant to said order of the Allen County Common Pleas Court and the statutory mandate of O.R.C. Section 3767.04.

On October 26, 1972, William H. Dakota, the defendant in the state abatement action, *Ohio ex rel Huffman v. William H. Dakota et al*, filed a civil rights complaint in the United States District Court, Northern District of Ohio, Western Division, entitled *"William Dakota v. Edward Fair, Sheriff, and Joe Garlock, Deputy Sheriff, Civil Case No. 72-384,"* alleging a cause of action under 42 U.S.C. Section 1983, together with Motions for a Temporary Restraining Order, a Preliminary Injunction, and to convene a 3-judge panel. Dakota also filed a "Memorandum of Law on Effect of Removal on State Court Action" in the Allen County Common Pleas Court on the same date. A copy of said pleadings is reprinted in the Appendix at pages F3-27. Arguments on the Motion for Temporary Restraining Order were heard on October 30, 1972, and the matter was taken under advisement.

Thereafter, United States Federal District Judge Nicholas J. Walinski, Northern District of Ohio, Western Division, ruled, in an opinion and order filed in said federal action on Nov. 2, 1972, that the injunction of the state court, "has been overbroadly applied" and flew directly in the face of the United States Supreme Court decision in *Near v. Minnesota*, 283 U.S. 697 (1931), and ordered that the state court injunction be stayed "so far as it affects the showing of films which have not been held to be obscene in a prior adversary hearing." Judge Walinski further stated in his opinion that since the Ohio court may interpret the statute constitutionally upon a hearing for the permanent injunction, he would "reserve a ruling on the convening of a 3-judge panel under 28 U.S.C. Section 2284 until such time as the federal abstention doctrine is inapplicable." A copy of Judge Walinski's opinion and order is reprinted in the Appendix at pages G3-5.

In an attempt to comply with Federal District Judge Walinski's order of Nov. 2, 1972, appellant Huffman on Nov. 5, 1972, filed a motion in the state case, *State of Ohio*

ex rel Huffman v. William H. Dakota, et al. Court of Common Pleas of Allen County, No. 72 Civ 0326 alleging that on November 4, 1972, William H. Dakota had violated the terms of the Allen County Common Pleas Court order of Oct. 24, 1972 by exhibiting two obscene motion picture films, entitled "Sexual Freedom Now" and "Shoot-out at Beaver Alls (sic)", which depicted numerous scenes of sexual intercourse, cunnilingus and fellatio and asked the court to order William Dakota to appear with the films so that the court might determine whether said films were obscene and to show cause why he should not be punished as for a contempt. On the same day, the court ordered that William H. Dakota should appear in Court with said films on November 7, 1972, at 9:00 A.M., which was also the same hearing date previously scheduled for appellant Huffman's Motion for a Permanent Injunction, so that a determination could be made as to whether such films were obscene and, upon such a determination, to show cause why he should not be punished as for contempt. A copy of said motion and said court order (journal entry) is reprinted in the Appendix at pages H3-6.

On Nov. 7, 1972, the Court of Common Pleas of Allen County, Ohio, convened and evidence was presented on appellant Huffman's application for a permanent injunction. At the conclusion of the evidence presented on that date, the court, with concurrence of counsel for the plaintiff and the defendants, continued the hearing on the permanent injunction in anticipation that the suit might be settled. The hearings on the application for permanent injunction was rescheduled for Nov. 30, 1972.

On November 17, 1972, Pursue, Ltd. purchased the interest of William Dakota in Cinema I Theatre and obtained by assignment all rights and duties of William Dakota as lessee of the premises of 69 Public Square, Lima, Ohio, and commenced to operate the Cinema I Theatre (see Appendix at page J-8, Para. 15 and 16).

On Nov. 22, 1972, upon information and belief that a new party, Robert Hollis, was violating the Common Pleas Court order of October 24, 1972, by participating in the exhibition of obscene motion picture films at the Cinema I Theatre,

appellant Huffman caused a certified copy of the Common Pleas Court order of Oct. 24, 1972, to be personally served upon Robert Hollis.

On Nov. 30, 1972, the Court of Common Pleas of Allen County, Ohio, reconvened in Ohio *ex rel Huffman v. William H. Dakota et al*, on the matter of the application for permanent injunction. Counsel for the defendant William H. Dakota and other defendants employed at the Cinema I Theatre, were not present at said hearing, having advised the court that the court could proceed in the hearing of the cause without the appearance of the defendants or their counsel. Additional evidence was presented by appellant Huffman in such state action, including testimonial evidence from police officers who had viewed 12 other motion picture films which were alleged in appellant Huffman's complaint to have been exhibited at the Cinema I Theatre and to be obscene, and documentary evidence consisting of approximately 8,000 still photographs in the form of time-motion studies of the said 12 motion picture films. Such time-motion studies consisted of a chronological series of still photographs from the motion picture films, timed in their relative order of appearance, which by stopping the movement appearing on the motion picture screen and recording the same, permitted the type of conduct being portrayed therein to be analyzed by the officer giving testimony as to what he saw exhibited at the motion picture theatre as a part of the past recollection recorded testimony of such witness.

On Nov. 30, 1972, at approximately 2:30 P.M. the Allen County Common Pleas Court granted a permanent injunction and thereafter journalized its order. A copy of said judgment entry is reprinted in the Appendix at pages 13-7. In its final judgment, the court made the following findings: 1. That the Cinema I Theatre at 69 Public Square, Lima, Ohio, is operated by defendant William H. Dakota; 2. That the defendant William H. Dakota has engaged in a course of conduct of displaying motion picture films at said Cinema I Theatre which are obscene under the Ohio test for obscenity; 3. That the defendant's conduct and continuous exhibition of ob-

scene motion picture films constitutes a public nuisance as defined by the Ohio Revised Code, Section 3767.01(c); 4. That the defendants, Flora Mary Collins Moor, Leland Samuel Collins, and Sara Lee Collins Wallace are the owners of the premises being used by the defendant William H. Dakota to engage in the conduct which constitutes the nuisance; 5. That said owners leased said premises to the defendant William H. Dakota under the name of William Kern, Jr. and that the defendants Brownell, Smith, Brown, and Scott are employed at the theatre. The court ordered the following: 1. Permanently enjoining the defendants and all of the persons acting in concert or participating with them from conducting the said nuisance; 2. Assessed a tax of $300.00 against the Cinema I Theatre and against William H. Dakota personally; 3. Ordered all personal property used in conducting the nuisance as aforesaid to be removed from 69 Public Square, Lima, Ohio, and sold in the manner provided for the sale of chattels under execution; and 4. Extended its order of Oct. 24, 1972, closing the Cinema I Theatre, issued by way of preliminary injunction, and forfeited the lease and ordered it closed for any purpose for a period of one year unless sooner released by order of this court pursuant to the defendant-owners fulfilling the requirements provided in Section 3767.04 of the Ohio Revised Code and ordered the defendant William H. Dakota to pay the costs therein.

Within two hours of the entry of the final judgment forfeiting the lease for a period of one year, the theatre was closed and the keys seized by law enforcement agents. (See Appendix at page J-9).

On Dec. 1, 1972, appellee corporation filed an action in the United States District Court for the Northern District of Ohio, Western Division, entitled *Pursue, Ltd. v. Lawrence S. Huffman, in his capacity as Prosecutor of Allen County, Ohio, and Edward Fair, in his capacity as Sheriff of Allen County, Ohio*, CIV 72-432, alleging a Civil Rights cause of action under 42 U.S.C. Section 1983, together with motions for a temporary restraining order, preliminary and final injunction and application for a 3-judge court. A copy of said complaint is reprinted in the Appendix at pages J3-18.

On Dec. 1, 1972, the same date that the federal action was filed, United States District Court Judge Nicholas J. Walinski entered an ex parte order in such action, "to prevent great and irreparable harm to the plaintiff, prior to the convening of a 3-judge court in this matter, pursuant to 28 U.S.C., Section 2248" which ordered the judgment of the Allen County Common Pleas Court in *State ex rel Huffman v. William H. Dakota et al.*, 72-CIV-0326, dated Nov. 30, 1972, stayed except "insofar as any order which may apply to films that have previously been declared obscene in a prior adversary hearing". A copy of said order is reprinted in the Appendix at page J-19.

In an attempt to enforce the order of the Common Pleas Court of Nov. 30, 1972, while still complying with the federal court order filed on Dec. 1, 1972, appellant filed a motion in the state court in *State ex rel Huffman v. William H. Dakota, et al.*, 72-CIV-0326, on Dec. 4, 1973, requesting that the films located at 69 Public Square, Lima, Ohio, be viewed by the court and that a judicial determination be made as to whether or not said films were obscene and upon a finding of obscenity, that the court order said films not to be exhibited at 69 Public Square, Lima, Ohio, and set Dec. 4, 1972, as the hearing date. A copy of said motion and notice of hearing is reprinted in the Appendix at page K-3.

On Dec. 4, 1972, upon notice to counsel for defendant Robert Smith and Robert Hollis, the Court of Common Pleas of Allen County, Ohio, convened in *Ohio ex rel Huffman v. William H. Dakota, et al.* 72 CIV 0326 to hear Appellant Huffman's motion therein for a hearing on said films and the court viewed the motion picture film entitled "Sexual Freedom in Denmark." said film having been subpoenaed by appellant Huffman. The court granted the request of Ted Iorio, counsel for Robert Smith and Robert Hollis, to withhold making a decision as to the obscenity of said motion picture film to enable counsel to present evidence that said motion picture film was not obscene, and set the matter for hearing on Dec. 12, 1972 in the Court of Common Pleas of Allen County, Ohio.

On Dec. 11, 1972, the day prior to said hearing date, counsel Ted Iorio, counsel for Robert Smith and Robert Hollis, filed a petition for removal in the United States District Court for the Northern District, Western Division, entitled *State of Ohio ex rel Lawrence S. Huffman, respondent v. William H. Dakota, et al.*, petitioner, Case No. C72-445[2], and Notice of Removal with the Clerk of the Allen County Common Pleas Court and served the same on Appellant Huffman. Said removal frustrated appellant's attempt to enforce the state court order while still complying with the federal court's temporary restraining order. A copy of said petition for removal and notice of removal is reprinted in the Appendix at page L3-8.

On December 11, 1972, the Sixth Circuit Court of Appeals designated Circuit Judge Anthony J. Celebrezze, District Court Judges Nicholas J. Walinski, and Don J. Young as members of the three-judge District Court in *Pursue, Ltd. v. Huffman, et al.*, 72 Civ 432. On December 21, 1972, said three-judge District Court ordered all parties to file briefs in the matter on or before January 15, 1973. Copies of such orders are reprinted in Appendix at pages L22-25.

On December 18, 1972, appellant Huffman filed a motion to remand and supporting memorandum and a motion for immediate hearing, in *William H. Dakota et al. v. Lawrence S. Huffman*, 72 Civ 445, a copy of which is reprinted in the Appendix at pages L9-21.

On December 29, 1972, Pursue, Ltd. filed amendments to its complaint in *Pursue, Ltd. v. Huffman, et al.* 72 Civ

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[2] The petition for removal was untimely under 28 U.S.C. Section 1446(b). See State of Ohio ex rel Ervin V. Gilligan, 35 O. App.2d 84, 64 Ohio Ops. 2d 204, 300 N.E. 2d 225 (1973) which holds such an untimely filing to be a nullity and ineffective to divest the state court of jurisdiction. On April 26, 1973 (six days after the decision here), the three-judge Federal District Court, sua sponte, filed an opinion and order dismissing the removed case (72 CIV 445) as being moot. Appellants have appealed such dismissal and that appeal has been stayed pending disposition of the appeal herein in Huffman et al. v. Pursue, Ltd. (see copy of order of U. S. Court of Appeals for the Sixth Circuit dated October 22, 1974, at Appendix C to this Brief).

432 and on January 5, 1973, appellants filed their answers thereto. A copy of said amendments and answers is reprinted in the Appendix at pages M4-14.

Appellants herein filed their trial brief in the federal action, *Pursue, Ltd. v. Huffman, et al.*, 72 Civ 432 on January 16, 1973. At Point 3 of their trial brief, appellants pointed out to the three-judge court that Pursue, Ltd.'s federal lawsuit was spurious, that it constituted an abuse of the federal process and was prosecuted for the sole purpose of continuing the exhibition of obscene motion picture films and deriving as much income as possible from their exhibition; further, that in view of the evidence in this case, Pursue, Ltd. had no reasonable hope of establishing the necessary prerequisites for success in federal intervention, namely: 1. Bad faith; 2. Harassment; and 3. Great and immediate irreparable harm. In support of those contentions, appellants attached thereto four affidavits of Deputy Sheriff Fred H. Hawk, describing the contents of eight (8) films viewed by said affiant at the Cinema I Theatre subsequent to the federal court order of Nov. 2, 1972, which reopened that theatre, and the alleged assignment of November 24, 1972, from William H. Dakota to Pursue, Ltd. Deputy Sheriff Hawk's description of the eight films viewed by him on the following dates reads as follows:

Dec. 7, 1972

"Affiant says that the credits of 'Skin Flick Madness' showed that it was produced by 'Suckit Films'; that the general theme of the movie centered about a male and female viewing a stag film, becoming excited by the various sexual acts depicted in the stag film and engaging in sexual activity themselves during the stag film; and that the movie lasted approximately 55 minutes during which time nude males and nude females were depicted on the screen engaging in several explicit acts of fellatio, sexual intercourse, lesbianism and cunnilingus.

'Affiant says that the second feature was entitled 'Okie Maid' which lasted approximately 50 minutes; that the general theme of the movie centered about the

sexual activities of three men who lived together in a mountain shack; and that the movie had several explicit scenes of nude males and nude females engaged in acts of lesbianism, cunnilingus, female masturbation, group sex, sexual intercourse, rape, fellatio and anal sodomy.

"Further affiant saith not."

Dec. 14, 1972

"Affiant says that the first feature he viewed was entitled 'The Honeymoon Is Over' which lasted approximately one hour; that the general theme of the movie centered about the sexual frustrations and inadequacies of a newly married couple; and that the motion picture contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, cunnilingus, lesbianism, and fellatio.

"Affiant further says that he viewed the second motion picture entitled 'Brit Blazer' which lasted approximately one hour; that the general theme of the movie centered about the kidnapping of a female and her rescue by a female secret agent, Brit Blazer; that the feature contained several explicit scenes of nude males and nude females engaged in acts of fellatio, lesbianism and cunnilingus.

"Further affiant saith not."

Dec. 30, 1972

"Affiant says that the first feature he viewed was entitled 'Bells, Books and Balls' which lasted approximately one hour; that there was no general theme of the movie ascertainable by the affiant; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of group sex, sexual intercourse, lesbianism, fellatio and cunnilingus.

"Affiant says that he viewed the second feature entitled 'Mother Knows Best' which lasted approximately one hour; that the general theme of the movie centered about the sexual adventures of a mother and daughter traveling to the West Coast; that the film contained several explicit scenes of nude males and nude females

engaged in acts of sexual intercourse, lesbianism and cunnilingus.

"Further affiant saith not."

Jan. 10, 1973

"Affiant says that the first motion picture he viewed was entitled 'The Hedonist-Hypnotist' which lasted approximately one hour; that the general theme of the feature centered about the use of hypnosis to effectuate sexual relations; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, fellatio, cunnilingus, and group sex.

"Affiant says that he viewed the second feature entitled 'Documentary of a Madam' which lasted approximately one hour; that the general theme of this feature centered about the activities of a brothel; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, fellatio, cunnilingus and lesbianism.

"Further affiant saith not."

A copy of Point 3 of the trial brief and the four affidavits of Deputy Sheriff Hawk, referred to above, is reprinted in the Appendix at page N3-12.

On February 12, 1973, appellants herein filed three motions with detailed supporting memoranda in *Pursue, Ltd. v. Huffman*, 72 Civ 432, namely: 1. A Motion to Dismiss; 2. A Motion to Dissolve the Temporary Restraining Order, and 3. A Motion for Immediate Hearing. Copies of said motions and the supporting memoranda are reprinted in the Appendix at pages O3-16. In the memoranda which supported said motions, appellants herein pointed out to the federal court that the federal action, *Pursue Ltd. v. Huffman*, 72 Civ 432, was a sham pleading brought in bad faith, and that to permit further recognition thereof would only perpetuate the fraud and the resultant gross abuse of the federal judicial process already thrust upon the court. The memorandum in support of the Motion for Immediate Hearing states in part, as follows (See Appendix at page O-14):

"In support of defendants' allegations, defendants have attached to and incorporated by reference Exhibits A, B and C to their motions to dissolve temporary restraining order and to dismiss which are affidavits of persons who have seen the motion pictures exhibited by plaintiff at subject premises for three successive weeks, January 10-30, 1973, together with photographic reductions of time-motion studies of said motion picture films. Tape recordings have been made of said films and will be available at the hearing of defendants' Motions to Dissolve Temporary Restraining Order and to Dismiss. (A copy of the said time-motion studies are not attached to copies of said motions served upon counsel for plaintiff as only one copy is presently available; said time-motion studies are available to plaintiff's counsel in the Clerk's Office, having been previously filed herein).

"Plaintiff's continuous exhibition of obscene motion picture films and abuse of the federal judicial process to perpetuate a fraud upon this court is flagrant and without precedent. Unfortunately, this court has been placed in a position of making an order based upon a contention of great and immediate irreparable injury by plaintiff which has, as the attached exhibits demonstrate, resulted in great and immediate irreparable harm to the citizens of the State of Ohio, not the plaintiff . . . ."

A copy of the affidavits of the law enforcement officers which described to the court the nature of the subject matter being exhibited at the Cinema I Theatre, during the period January 10-30, 1973, and copies of the time-motion studies of said films, which accompanied said affidavits when they were filed with the three-judge Federal District Court on February 12, 1973, are reprinted in the Appendix at pages P2-39, Q2-41 and R3-51.[3]

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[3] In addition to the three time-motion studies (Appendix P at pages 2 - 39, Appendix Q at pages 2 - 41, and Appendix R at pages 3 - 51) filed with the Federal District Court on February 12, 1973 in the motion to dismiss in Pursue, Ltd. v. Huffman, C72-432, the Federal District Court also had before it the photographic time-motion studies for the seven

On February 12, 1973, appellants herein also filed a second motion for an immediate hearing with supporting memorandum on the motion to remand in *William H. Dakota v. Huffman, et al.*, 72 CIV 445, previously filed with the Court on December 18, 1972 (See Appendix at pages L17-21.) A copy of the second motion is reprinted in the Appendix at pages O17-21. On March 12, 1973, not having heard anything from the court on the two previous motions for immediate hearings on the motion to remand in *William H. Dakota v. Huffman, et al.* 72 CIV 445, appellants filed an additional memorandum. A copy of the March 12, 1973 memorandum is reprinted in the Appendix at pages O22-34.

The three-judge Federal District Court heard oral arguments on the temporary restraining order in *Pursue, Ltd. v. Huffman, et al.* 72 CIV 432, on March 12, 1973. A copy of the transcript of the March 12 proceedings (hereinafter referred to by the designation "T") has been lodged with the Clerk of this Court as Exhibit 1 to the Petition for a Writ of Mandate or Prohibition, in *Huffman et al v. United States District Court for The Northern District of Ohio, Western Division*, No. 72-1613, on file with this Court (See Supra, at page 1, footnote 1). During such proceedings, the court defined the scope of the hearing as:

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weekly programs which were attached to and pleaded by reference in the amended complaint in the state court abatement action (72 CIV 0326) (see Appendix at page D-9, paragraph 5). The amended complaint in the state court abatement action (72 CIV 0326) with its autoptical photographic content was before the Federal District Court on Appellants' two motions for an immediate hearing on the motion to remand, filed on December 18, 1972, and February 12, 1973, following the filing of the removal action on December 11, 1972 (see text at Footnote 1A supra). The amended complaint in the state abatement action (72 CIV 0326) with its autoptical evidence was also a part of the record in Pursue, Ltd. v. Huffman, C72-432 for the following reasons:

> The complaint in Pursue, Ltd. v. Huffman, C72-432 adopted by reference and incorporated the complaint filed in William Dakota v. Fair et al., C72-384 (see Appendix at page J-8, paragraph 14), which complaint in turn, incorporated by reference, as Appendix 1, the complaint filed in State of Ohio ex rel Huffman v. Dakota, 72 CIV 0326 (see Appendix at page F-9, paragraph 7).

"THE CLERK: The matter before the Court this morning is *Pursue Ltd., et al versus Lawrence S. Huffman, et al.*, bearing Civil No. 72-432. Hearing on Temporary Restraining Order. Parties by counsel are present."

"THE COURT: The Court wishes to inform counsel that the only question before this three-Judge Court is the constitutionality of the so-called Ohio Nuisance Statute. . . ." (T, page 2, lines 8-11,)

and

". . . The question, as Judge Celebrezze pointed out is whether or not the Ohio Nuisance Statute, that is Ohio Revised Code 3767.01 and the following sections can be employed to close a theatre as a public nuisance . . . ." (T, page 2, lines 19-22.)

"THE COURT: I am sure counsel is aware we can hold a statute constitutional, but unconstitutional as it being applied and that--well, the question before us is if that was a constitutional section there, we still would also reserve the right to make the determination whether you are applying it constitutionaly. . . ." (T. page 19, lines 16-22.),

On April 20, 1973, the court issued its opinion and order holding the closure portions of the Ohio Nuisance Statute, Sections 3767.04 and 3767.06, unconstitutional and enjoined the appellants herein from executing that portion of the Allen County Common Pleas Court final judgment of November 30, 1972, in *State of Ohio ex rel Huffman v. William H. Dakota, et al.*, 72 CIV 0326, which ordered the closing of the Cinema I Theatre at 69 Public Square, Lima, Ohio, "for a period of one year unless sooner released by order of Court pursuant to the defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio ...."(See Appendix at pages A3-12.)

A notice of appeal was filed in the United States Supreme Court on May 14, 1973.

On June 1, 1973, appellants petitioned this Court for a Writ of Mandate or Prohibition in *Huffman et al v. The United States District Court for The Northern District of Ohio,*

Western Division et al. No. 72-1613, and also made application to Justice Potter Stewart for a stay order or writ of injunction, and an order to advance the date set for filing of briefs in opposition to the petition. On June 25, 1973, both matters were referred to and denied by the Court as a whole. *Huffman et al. v. U.S. District Court for The Northern District of Ohio et al.*, U.S. , 37L.Ed.2d 1039 __ S.Ct. __ June 25, 1973.

The Jurisdictional Statement was filed on August 14, 1973.

On September 18, 1973, this Court requested that a response be filed by the Soliciter General of the United States and Pursue Ltd. In brief responses, both parties took the position that the "Jurisdictional Statement (subsequently filed on August 14, 1973) is in essence identical to the petition for Writ of Mandamus or Prohibition with regard to the substantive issues," and urged denial on that ground. See pages 8 and 13 of Response In Opposition To Petition For Writ of Mandamus or Prohibition of Pursue Ltd., filed with this Court on or about Nov. 2, 1973. Ten days later, this Court denied the Motion for leave to file a petition for writ of mandamus and/or prohibition. *Huffman et al. v. U. S. District Court for the Northern District of Ohio et al.* _____U.S. ____, 38L.Ed.2d 325, ___ S.Ct. ____ (Nov. 12, 1973).

SUMMARY OF ARGUMENT

Under the doctrine of *lis pendens*, Pursue, Ltd. lacked standing to prosecute a civil rights action. O.R.C. section 2703.26; 34 Ohio Juris. 2d. 684. On November 17, 1972, the date that Pursue, Ltd. acquired from William Dakota its leasehold interest in Cinema I a civil proceedings *in rem* to determine the status of property at that address was on file in The Allen County Common Pleas Court and all parties in that action had been served. The complaint described by metes and bounds and by street address said premises and named the owner thereof. Actual notice of such

state lawsuit was given to Pursue, Ltd. on November 22, 1972, through service on Robert Hollis, the president of Pursue, Ltd. Finally, Pursue, Ltd. had actual knowledge of the final judgment of November 30, 1972, in the state court action (forfeiting the leasehold interest for a period of a year of William Dakota, Pursue, Ltd.'s assignor) prior to its filing of the federal action, having alleged that fact in its complaint. Under the doctrine of *lis pendens*, the final judgment of the Allen County Common Pleas Court in *Ohio ex rel Huffman v. William Dakota*, 72 CIV 0326 on November 30, 1972, forfeiting the leasehold interest of William Dakota, operated to divest Pursue, Ltd. of such interest in the property.

Under the mandatory provisions of 28 USC Section 2283, the United States District Court lacked jurisdiction to enjoin the proceedings in the state court inasmuch as the real estate which was the subject of the action was *in custodia lex* in the state court proceedings. *Toucey v. New York Life Insurance Co.*, 314 US 118. Under the *"in rem"* exception, not only may the federal court not interfere, but the contrary is true, namely, that, the state court, having jurisdiction over the *res*, has the authority to restrain any *federal* court proceedings which interfered with the *state* court proceedings. *Donovan v. Dallas*, 377 US 408.

Since the federal court lacked jurisdiction over the state court action and the real estate, its order enjoining Appellants Huffman and Fair from executing the Allen County Common Pleas Court judgment of November 30, 1972, was unauthorized and invalid. *Donovan v. Dallas*, 377 US 408 at 413.

In alleging federal jurisdiction under the Civil Rights Act of 1871 (42 USC Section 1983 and 1985), Appellee has failed to state a cause of action. In *Griffin v. Breckenridge*, this Court recognized that Sections 1983 and 1985, having been enacted at the same time, must be read together and as a whole. If a Section 1985(3) "Conspiracy" requires racial or perhaps otherwise class based invidiously discriminatory

animus then a 1983 action (conspiratorial or otherwise) must require the same animus. In any event, the legislative history, reviewed by this Court in *Griffin v. Breckenridge*, 403 U.S. 88 indicates that Congress in 1871 never intended the 1871 Act to be used as a vehicle for transforming a state public nuisance action to abate "obscenity" into a federal cause of action.

This Court's ruling on the cause of action in *Mitchum v. Foster* did not hold that 42 USC Section 1983 embraces a civil rights action of the sort pleaded there (based on a Florida obscenity public nuisance action). The *Mitchum* decision merely decided that the three-judge federal district court had erred in its prefatory ruling in the abstract that 42 USC Section 1983 was not an act of Congress within the "expressly authorized" exception to the anti-injunction statute.

If this Court holds that the complaint herein states a viable cause of action under 42 USC Section 1983, then this Court is inviting a recurrence of the same incredible log jam of federal interference cases which appeared on this Court's docket during the 1969-1972 terms of court. Further, justice will not be served thereby, for a prosecutor cannot properly discharge his governmental responsibilities in this area under the directorship of two judicial masters, whose rulings are, more often than not, in direct conflict with each other.

Even assuming that, in theory, a cause of action can be state under 42 USC Section 1983, based upon legal action taken by a county prosecutor to abate a "place" and sexual conduct therein which amounts to a public nuisance, still the facts pleaded in *Pursue Ltd. v. Huffman*, C72-432, on their face, failed to establish such a cause of action and the District Court, for that reason alone, should have dismissed the case. The state legal action, which Pursue Ltd. sought to nullify, pleaded and established proof of a public nuisance based upon *specific* sexual conduct. In such a case, the federal

complaint must also plead highly specific facts if federal jurisdiction is to be invoked. Where the allegations are broad, conclusory, and lack supporting factual allegations, as here, the complaint must be dismissed.

When the three-judge court, on March 12, 1973, heard Appellant's motion to dissolve the temporary restraining order and to dismiss the complaint (see Docket Entry for March 12, 1972 at Appendix page Z-27) it erroneously failed to consider: (1) Appellee's course of conduct from July 1972 through September 1972 as pleaded and proved in the state court trial (and alleged in the federal complaint); (2) Appellee's course of conduct from December 7 through January 10 (as presented through the affidavits of Deputy Sheriff Hawk, copies of which appear in the Appendix at Page N-9 through N-12), and (3) Appellee's course of conduct from January 10 through January 30 (as presented by affidavits and time-motion studies, copies of which appear in the Appendix at page 0-14 and Appendices P, Q and R). Construing the allegations of the complaint favorably to the Appellee, it still remains beyond doubt that under such allegations, Appellee could not prove a set of facts in support of his claim which would entitle him to relief. *Scheuer v. Rhodes* ___ U.S. ___ (Apr 17, 1974).

Further, the pleadings demonstrated that this was a case which clearly called for an application of the rule of law expressed in *U.S. v. Raines*, 362 U.S. 17, which holds that one to whom application of a statute is constitutional will not be heard to attack the statute on the grounds that impliedly it might also be taken as applying to other persons and other situations in which its application might be unconstitutional.

Further, the three-judge court should have dismissed the Pursue, Ltd. complaint as a sham pleading (i.e., good in form but false in fact and not pleaded in good faith), based upon the state court record and the uncontroverted affidavits of Appellee's course of conduct in December of 1972 and January of 1973. 61 Am Jur. 2d, Pleading, page 474.

The hard-core nature of the films continuously being exhibited at the Cinema I Theatre demonstrated that the issue before the Court was one of law (obscenity per se) and not one of fact. To permit Appellee to commercially exploit sex under the pretense of freedom of expression worked an injustice on the People of the State of Ohio and constituted an abuse of the federal court process.

That portion of the Pursue, Ltd. complaint which sought equitable relief should have been dismissed under the equitable maxim that "Equity will not be the abettor of iniquity." *McGrew et al v. City of Jackson, Mississippi* 307 F. Supp 754.

The three-judge court should have dismissed the case for failure to raise a substantial federal question. *Idlewild Bon Voyage Liquor, Corp. v. Epstein*, 370 U.S. 713; *Kingsley Book Inc. v. Brown*, 354 US 436.

The Pursue Ltd. complaint failed to supply a basis for equitable jurisdiction and federal intervention under the rules established by this Court in *Younger v. Harris* 401 U.S. 37, *Samuels v. Mackell* 401 U.S. 66, and *Mitchum v. Foster* 407 U.S. 225. As a matter of law, Appellants could not be said to be acting in bad faith or for purposes of harassment where (1). the statute relied upon had been held to be constitutional in *Grove Press, Inc. v. Flask*, 326 F. Supp. 574 (Mar. 10, 1970), and (2) the state trial court had upheld Appellants' claim of a public nuisance after trial on the merits both on the preliminary injunction on Oct. 24, 1972, and on the final injunction on Nov. 30, 1972. Further, a civil statute requiring a forfeiture for a period of one year of the leasehold interest in property used in conducting or maintaining a public nuisance is clearly constitutional, *U.S. v. U.S. Coin and Currency* 401 U.S. 715, *One Lot Emerald Cut Stones* and *One Ring v. U.S.*, 409 U.S. 232; *Astol Calero v. Pearson Yacht Leasing Co.*, ___U.S. ___ (May 15, 1974).

The trial facts do not warrant an application of the rule stated in *Steffel v. Thompson*. To extend Steffel to an "in rem" public nuisance case would create a direct conflict with the basic rule of law regarding subject matter jurisdiction.

stated in *Toucey v. N.Y. Life* Insurance Co., supra. Further, such would bring about a conflict with the rule voiced by this Court in *Miller v. California*, in that federal courts and not state courts would be applying state obscenity statutes and state standards regarding sexual conduct in public.

A federal court has no power to interfere with state appellate proceedings. It may not, in any event, stay proceedings in a state court after a final judgment has been entered in the state court action. Compare the dissent of Justice Douglas in *Byrne v. Karalexis*, 396 US 976, 24 L.Ed.2d 447 at 486.

The Court erred when it concluded that, even though a public nuisance had been found to exist based upon a course of conduct extending over a period of eight weeks and involving the exhibition of 16 obscene motion picture films, the state could not apply a statutory one year penalty because such penalty would operate against the theater operator personally and prevent him from showing films at that location in the future which might be constitutionally protected. In so ruling, the Court below lost sight of the fact that the Ohio Legislature had provided an "in rem" rather than an "in personam" remedy. The federal court decision failed to give proper consideration to the rule of statutory construction which favors statutes involving the public welfare.

Subsequent to the decision of the federal district court below, the Ohio Supreme Court construed the "padlock" provisions of the Ohio Statute, as those provisions applied where only one obscene motion picture film was being exhibited. *Ohio ex rel Ewing v. "Without A Stitch"*. In upholding the "padlock" remedy, the Ohio Supreme Court construed the release provisions of the Statute in a different manner than the federal district court, holding that such did *not* require the owner to show that "no film to be exhibited during the one year period will be obscene"

Under the statute, the trial court was not required to padlock the premises, upon a finding on the preliminary injunction hearing, that a public nuisance existed, where the person in charge etc. showed to the satisfaction of the Court that the nuisance had been abated. In *People of the State of California ex rel. Hicks v. "Sarong Gals"*, which considered a related

statute, the California Court of Appeal pointed out that, in such a case where the public nuisance had been established, the burden of presenting evidence that the public nuisance had been abated, then shifted to the defendant.

The error in the logic of the federal district court opinion is the result of faulty deductive reasoning which proceeded somewhat as follows: *Major premise:* To enjoin the showing of films in the future without a prior adversary hearing on the obscenity of such films is a prior restraint and unconstitutional under *Near v. Minnesota. Minor premise:* The Ohio Public Nuisance Statute (Ohio Revised Code Sections 3767.04 and 3767.06) operates to prevent the showing of films in the future without an adversary hearing on the obscenity of those films.

Conclusion: The Ohio Public Nuisance Statute (Ohio Revised Code Sections 3767.04 and 3767.06) is unconstitutional. The court should have reasoned as follows: *Major premise:* Under the ancient doctrine of deodand expressed in *U.S. v. U. S. Coin and Currency* 401 U.S. 715 and *One Lot of Emerald cut Stone and One Ring v. U.S.* 409 U.S. 232, where a place is determined in a legal proceedings to be operating as a public nuisance involving countraband, a penality may be applied forfeiting the leasehold interest in the real property used in conducting such nuisance for a period up to one year. *Minor premise:* The Ohio Public Nuisance Statute (Ohio Revised Code Sections 3767.04 and 3767.06) operates to prevent the showing of films in the future without an adversary hearing on the obscenity of those films through forfeiture of the leasehold interest (use of the premises) as a penalty.

Conclusion: The Ohio Public Nuisance Statute (Ohio Revised Code Sections 3767.04 and 3767.06) is constitutional. "Legal Reasoning and Briefing" by Brumbaugh at page 56.

Two Courts have recently considered the "padlock" provisions of the red light abatement statute and have reached a contrary result. *Cincinnati Properties Inc. v. Simon Leis* and *People of the State of California ex rel Hicks v. "Sarong Gals"*. Both decisions held that the "padlock" provisions were a time

honored remedy involving the "place" and did not involve censorship or prior restraing. See copies of such decisions at Appendix A and D to this brief.

A state court is not limited to criminal prosecution as the only weapon in the armor of law but may use a *qui tam* action, injunction, or a combination of the three. Further, the laws of deodand may be utilized. *Kingsley Book, Inc. v. Brown*, 354 US 436. There can be little doubt that a prosecuting attorney can state a civil cause of action to abate a piece of real property as a public nuisance based upon a succession of successful criminal convictions for morals offenses of the same nature occurring at that location. Upon a finding that such public nuisance was continuing and presently existed, an Equity court could order the place closed as a public nuisance or lay down the conditions upon which the activity could remain in operation. The same result can also be reached by alleging and proving in a single trial (as was done in the State action herein) a course of continuing conduct, by establishing in evidence the series of separate criminal acts which were referred to in the first hypothetical.

The Public Nusiance Law of Ohio is based upon the widely-used Red Light Abatement Act, enacted by most of the states over 50 years ago, to compensate for certain inadequacies of the criminal law, regarding prostitution. That legislative device, which provide for the abatement of public nuisances and establish forfeitures, was aimed at "lewdness" of a different type. The historical development of this type of statute has proceeded in three directions: (1) Some states like Missouri use language which is clearly limited to houses of prostitution; (2) other states, like California, have used statutory language like "prostitution, assignation, and lewdness" in which, by judicial decision, the term "lewdness" has been given a broad meaning: (3) other states, such as the State of Ohio and Louisiana have adopted amendments which specifically include places where obscenity is exhibited.

The Ohio statutory language defining "nuisance" specifi-

cally encompasses a place where obscene films are exhibited. Its constitutionality as applied to the film "I Am Curious Yellow" was challenged in the federal system and upheld in *Grove Press, Inc. v. Flask*, 326 F. Supp. 574 (Mar. 10, 1970), vacated and remanded for further consideration in light of *Miller v. California* in *Grove Press, Inc. v. Flask*, ___ US ___, 37 L.Ed.2d 613, ___S.Ct.___(June 15, 1973). The Ohio Supreme Court has also upheld its constitutionality as applied to the motion picture film "Without A Stitch" in *State of Ohio ex rel Ewing v. "Without A Stitch"*, 37 O. St.2d 95, 307 N.E.2d 911 (Feb. 27, 1974):

The exhibition of one obscene motion picture film alone may provide a proper basis for a judicial closing of a theater for a year as a public nuisance. If the film is grossly obscene (for example, "Deep Throat") and has been playing for a substantial period of time, that fact alone can provide the basis for a padlock order. Upon other facts, the result may be otherwise, such as where the single exhibition was not so gross and was not representative of the exhibitor's course of conduct as customarily experienced, or such picture was "pulled" by a responsible exhibitor so that it reasonably could be found by the trial court that the public nuisance had been abated and no longer existed.

The plain language of Ohio Revised Code Sections 3767.04 and 3767.06 shows it to be entirely constitutional. Further, the constitutionality of those sections has been explicated by the recent interpretations given to them by the Ohio Supreme Court in *Ohio ex rel Ewing v. "Without A Stitch"*, *supra*.

ARGUMENT

I.

UNDER THE DOCTRINE OF LIS PENDENS, PURSUE LTD., AS AN ASSIGNEE WITH NOTICE, WAS BARRED FROM PROSECUTING THE CIVIL RIGHTS ACTION ALLEGED IN PURSUE, LTD. V. HUFFMAN, ET AL., C72-432.

A. The Doctrine of Lis Pendens.

A transferee of certain kinds of property which is the subject-matter of an equity suit takes subject to the outcome of the litigation. This is the so-called doctrine of lis pendens. The transferee is bound although he had no actual notice and paid value. It has often been said that lis pendens is a form of constructive notice. *Worsley v. Scarborough*, 3 Atk 392 (1746); Storey, Equity Jurisprudence, Section 536, 14 Edition, 1918. A second view is that the doctrine depends not on the fiction of constructive notice but on the necessities of the situation. *Bellamy v. Sabine*, 1 DeG and J 566 (1857). Cf *Turner v. Houpt*, 53 N.J. Eq. 523-526, 33 Atl. 28 (1895); note 7 Columbia Law Rev. 282 (1907); 20 Harvard Law Rev. 488 (1907).

The Ohio Statute on *lis pendens*, O.R.C. Section 2703.26, provides that when summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title. This statute is simply declaratory of the Common Law doctrine of *lis pendens*, and is to be construed with reference to the Common Law rules in respect of the doctrine. 34 Ohio Jurisprudence 2d, Lis Pendens, page 685. In interpreting this statute, the Ohio Supreme Court has indicated that the doctrine is not based, or at least does not rest primarily, on any doctrine of notice, but rests upon public policy and necessity. In other words, it may be said that the doctrine rests upon the power the court acquires over the property in *litis pendence*, and cannot have its

functions frustrated by dealings *inter parties* with the *res* during litigation. Suits might be interminable, and judgments without fruits, if one litigant could impose upon an opposing litigant the necessity of making new parties as often as he chose to convey property involved in the suit. 34 Ohio Jurisprudence 2d, Lis Pendens, page 687. While the general rule is that a judgment or decree binds only parties and those in privity with them, and is not conclusive as against strangers to the action, yet, according to the doctrine of *lis pendens*, one who acquires an interest in property which is at that time involved in litigation in a court having jurisdiction of the subject matter and of the person of the one from whom the interests are acquired takes subject to the judgment or decree, and is as conclusively bound by the result of the litigation as if he had been a party thereto from the outset. This is so irrespective of whether he has been made a party to the proceedings, or had actual notice of the pendency of the proceeding, and even where there was no possibility of his having had notice of the pendency of the litigation. 34 Ohio Jurisprudence 2d Lis Pendens, page 684.

In order that there may be a valid and effective *lis pendens*, four elements must be present: (1) The property must be of a character to be subject to the rule; (2) the Court must have jurisdiction both of the person and the *res;* (3) the property or *res* involved must be sufficiently described in the pleadings; and (4) the litigation must be about some specific thing that must be necessarily affected by the termination of the suit.

B. Pursue, Ltd. Had Actual and Constructure Notice of the State Court Litigation at the Time it Acquired its Leasehold Interest and Actual Notice of the State Court Final Judgment at the Time the Federal Civil Rights Action was Filed.

On November 17, 1972, the date that Pursue, Ltd. acquired from William Dakota its leasehold interest in Cinema I at 69 Public Square, Lima, Ohio, a civil proceedings *in rem* to determine the status of property at that address (whether

it was a public nuisance) entitled, *Ohio ex rel Huffman v. Dakota*, 72 CIV 0326, was on file in Allen County Common Pleas Court and all parties in that action had been served (see Statement of Facts, pages 7-9). The complaint described by metes and bounds and by street address said premises and named the owners thereof (see Appendix at pages C5-6. Actual notice of such state lawsuit was given to Pursue, Ltd. on November 22, 1972, through service on Robert Hollis, the president of Pursue, Ltd. (see Statement of Facts at page 12. Further, Pursue, Ltd. was formed as a corporation by the attorneys for William Dakota in the state action for what would appear to be the specific purpose of taking an assignment of the property from Dakota in an attempt to avoid the consequences flowing from the adverse state court ruling. Finally Pursue, Ltd. had *actual* knowledge of the final judgment of November 30, 1972, in the state court action forfeiting the leasehold interest (for a year) of William Dakota, Pursue, Ltd.'s, Assignor, prior to its filing of the federal action having alleged that fact in its complaint (see Appendix at pages J7-8).

Under the Statement of Facts, noted above, and the doctrine of *lis pendens*, the final judgment of the Allen County Common Pleas Court in *Ohio ex rel Huffman v. William Dakota*, 72 CIV 0326, on November 30, 1972, forfeiting the leasehold interest of William Dakota, operated to divest Pursue, Ltd. of such interest in the property.

II

UNDER THE MANDATORY PROVISIONS OF 28 USC, SECTION 2283, THE THREE-JUDGE FEDERAL DISTRICT COURT ACTED IN EXCESS OF ITS JURISDICTION WHEN IT ENJOINED APPELLANTS FROM EXECUTING THE FINAL JUDGMENT OF THE ALLEN COUNTY COMMON PLEAS COURT WHICH HAD SUBJECT MATTER JURISDICTION OVER THE THEATRE AND HAD ORDERED THE SAME CLOSED AS A PUBLIC NUISANCE.

A. The Federal District Court Lacked Jurisdiction Over the Subject Matter (Real Estate) Which, at That Time Was in Custodia Lex in the State Court Which Had Exclusive Jurisdiction to Proceed.

The federal court lacked jurisdiction over the subject real estate which at that time was in *custodia lex* in the state court *in rem* proceedings in *Ohio ex rel Huffman v. Dakota*, 72 CIV 0326. The federal court failed to recognize that the state court civil action brought under Ohio Revised Code, Section 3767 *et seq.* was both an *in personam* and an *in rem* action[4] - *in personam*, in so far as the defendants, who were before the court, might be enjoined by the court's rulings, and *in rem*, in that the status of the property was also to be determined by the court. In *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941), Justice Frankfurter stated the principle as:

> "Third. This brings us to applications of Section 265 apart from these statutory qualifications. The early decisions of this Court applied the Act of 1793 as a matter of course. However, a line of cases beginning with Hagan v. Lucas, 10 Pet. 400, 9 L.Ed. 470, holds that the court, whether federal or state, which first takes possession of a res withdraws the property from the reach of the other. Taylor v. Carryl, 20 How. 583, 597, 15 L.Ed. 1028; Freeman v. Howe, 24 How. 450, 16 L.Ed. 749. See Kline v. Burke Construction Co., 260 U.S. 226, 235, 43 S.Ct. 79, 83, 67 L.Ed. 226, 24 ALR 1077: 'The rank and authority of the (federal and state) courts are equal, but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity,

[4]See, however, the court's remarks on "standing" at footnote 1 (Appendix at page A-5).

actual or potential, does not exist the rule does not apply. Since that necessity does exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.' "

One of the line of United States Supreme Court cases referred to by Justice Frankfurter in *Toucey, supra*, was *Orton v. Smith*, 18 How. 263, 15 L.Ed.2d 393 (Feb. 28, 1856). The High Court's reasoning in *Orton v. Smith* has particular relevance to the state action herein, where county officials are proceeding in a state court to abate a public nuisance upon county land over which they have a duty to administer state laws as interpreted by state courts. In *Orton v. Smith*, the Court stated at page 266 on facts which remarkably parallel the cause herein:

". . . it is a rule absolutely necessary to be observed by courts who have a concurrent jurisdiction, that in all cases 'where the jurisdiction of a court and the right of plaintiff to prosecute his suit in it have once attached that right cannot be arrested or taken away by proceedings in another court.' This rule, it is said, 'has its foundation not merely in comity, but in necessity. If one may enjoin, the other may retort by injunction, and thus the parties be without remedy.

"See Peck v. Jenness, 7 How. 625; Taylor v. Royal Saxon, 1 Wall Jr. 311.

"If the decree in this case can be of any value whatever, let us look at the consequences which may possibly and probably will arise, in case it is enforced.

"Orton, claiming as the bona fide assignee and purchaser of the title bond given by Knab, has a bill pending in the State Court to compel a transfer of the legal title. Pending this litigation, Knab assigns the legal title to a citizen of another state, who comes into the Court of the United States, praying an injunction against Orton from setting up his title. Suppose the State Court decrees the title to be in Orton, and compels Knab and Smith, his assignee, to release the legal title to him. Now, the court below has made a decree that enjoins Orton from ever

setting up his title against Smith. It is true the decree protests against interference with proceedings, in a state court; but unless it is construed so as to be a perfect 'felo de se,' it must be enforced in favor of the complainant somehow. When the sheriff puts Orton in possession under the decree of the State Court, and expels Smith, the Circuit Court, by its officer, must replace Smith, or imprison Orton for a contempt. This would indeed be a humiliating spectacle. Such a disreputable collision of jurisdictions should be sedulously avoided. This can only be done by refusing to entertain a bill of peace for an injunction when the title is in litigation in a court of concurrent jurisdiction; otherwise, the result of a bill of peace may be not peace but war; and instead of disspelling a 'cloud' from the title of either party, will doubly increase the darkness and difficulty with which it was environed.

"Decree of the Circuit Court is, therefore, reversed, and bill dismissed with costs, but without prejudice. . . ."

Following Toucey, supra, Congress enacted the anti-injunction statute in its present form. Thereafter, this Court again had occasion to consider the "in rem" exception in *Donovan v. Dallas*, 377 U.S. 408, 12 L.Ed.2 409, 84 S.Ct. 1579 (June 8, 1964). There, Justice Black, speaking for six members of the Court, acknowledged the continued vitality of that exception at page 412:

"Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida of Thurn v. Thompson*, 305 U.S. 456, 465-468, 83 L.Ed. 285, 290-292, 59 S.Ct. 275.

Nothing in existing case law contradicts this basic rule on jurisdictional power. As recently as *Mitchum v. Foster*, 407 U.S. 225, 32 L.Ed.2 705, 92 S.Ct. 2151 (June 19, 1972) this Court acknowledged this "in rem" exception to the blanket prohibition of the anti-injunction statute, at page 713:

> "In addition to the exceptions to the anti-injunction statute found to be embodied in these various Acts of Congress, the Court recognized other "implied" exceptions to the blanket prohibition of the anti-injunction statute. One was an "in rem" exception, allowing a federal court to enjoin a state court proceeding in order to protect its jurisdiction of a res over which it had first acquired jurisdiction. (See e.g., *Toucey v. New York Life Ins. Co.*, 314 U.S., at 135-136, 86 L.Ed. at 105, 106, 137 A.L.R. 967; *Freeman v. Howe*, 24 How 450, 16 L.Ed. 749; *Kline v. Burke Construction Co.*, 260 U.S. 226, 67 L.Ed. 226, 43 S.Ct. 79, 24 A.L.R. 1077.)"

and, after a historical discussion of *Toucey v. New York Life Ins. Co.*, supra, concluded at page 714:

> ". . . The congressional response to Toucey was the enactment in 1948 of the anti-injunction statute in its present form in 28 USC Sect. 2283. . . to 'restore the basic law as generally understood and interpreted prior to the Toucey decision. . .' "

The infirmities noted above, being apparent on the face of the complaint as filed, the federal court should have dismissed the federal action for lack of jurisdiction.

B. SINCE THE FEDERAL COURT LACKED JURISDICTION OVER THE STATE COURT ACTION AND THE REAL ESTATE, ITS ORDER ENJOINING APPELLANTS HUFFMAN AND FAIR FROM EXECUTING THE ALLEN COUNTY COMMON PLEAS COURT JUDGMENT OF NOVEMBER 30, 1972, RELATING TO SUCH REAL ESTATE, WAS UNAUTHORIZED AND INVALID.

In a similar situation in *Donovan v. Dallas*, supra, this Court ruled that since the State Court was without power to restrain the federal court proceedings, it likewise had no authority to restrain the litigants from participating in those federal proceedings, at 413:

"And it does not matter that the prohibition here was addressed to the parties rather than to the federal court itself. For the heart of the rule as declared by this Court is that:

> '. . .where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. . .The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum. (*Peck v. Jenness*, 7 How 612, 625, 12 L.Ed. 841,846. See also *Central National Bank v. Stevens* 169 U.S. 432, 42 L.Ed. 807, 18 S.Ct. 403; cf. *Baltimore & O.R. Co. v. Kepner*, 314 U.S. 44, 54 note 23, 86 L.Ed. 28, 33, 62 S.Ct. 6, 136 A.L.R. 1222.)'

"Petitioners being properly in the federal court had a right granted by Congress to have the court decide the issues they presented, and to appeal to the Court of Appeals from the District Court's dismissal. They have been punished both for prosecuting their federal-court case and for appealing it. They dismissed their appeal because of threats to punish them more if they did not do so. The legal effect of such a coerced dismissal on their appeal is not now before us, but the propriety of a state court's punishment of a federal-court litigant for pursuing his right to federal-court remedies is. That right was granted by Congress and cannot be taken away by the State. The

Texas courts were without power to take away this federal right by contempt proceedings or otherwise.

"It is argued here, however, that the Court of Civil Appeals' judgment of contempt should nevertheless be upheld on the premise that it was petitioners' duty to obey the restraining order whether that order was valid or invalid. The Court of Civil Appeals did not consider or pass upon this question, but acted on the assumption that petitioners were guilty of "wilfull disobedience of a valid order." 368 SW2d, at 211 (Emphasis supplied) *Since we hold the order restraining petitioners from prosecuting their case in the federal courts was not valid, but was invalid, petitioners have been punished for disobeying an invalid order."*

III

PURSUE, LTD. HAS FAILED TO STATE A CAUSE OF ACTION UNDER THE CIVIL RIGHTS ACT OF 1871 (42 USC, SECTIONS 1983 AND 1985).

A. The Congressional Purpose in Passing Such Legislation Was to Prevent Racial Discrimination. It Was the Intent of Congress at That Time That Those Sections Should Not be Interpreted as a General Federal Tort Law Authorizing Interference With What Traditionally Are Matters for the State Court Such as a Public Nuisance Lawsuit Brought by a County Prosecutor.

The jurisdictional grounds upon which Pursue, Ltd. relies in bringing this Federal lawsuit is the Civil Rights Act of 1871. Appellee's original complaint alleged a cause of action under 42 U.S.C. Section 1983 (See Appendix at page J-5), and an amendment to the complaint, filed on December 29, 1972, added 42 U.S.C. section 1985(3) as an additional jurisdictional grounds for the lawsuit (See Appendix at page M-4). Appellants submit that the legislative history (recently reviewed by this Court in *Griffin v. Breckenridge*, 403 U.S. 88, 29

L.Ed.2 338, 91 S.Ct. 1790 (June 7, 1971) surrounding the 1871 enactment, indicates that Congress in 1871 never intended the 1871 Civil Rights Act should be made a vehicle for converting the Federal District Court into a trial court for every case in which a pornographer raises a "free speech" defense in a state court action to suppress nuisances injurious to public health or morality.

1. Pursue, Ltd. Has Failed to State a Cause of Action Under 42 USC, Section 1985(3).

On the issue of whether Pursue Ltd. stated a cause of action under 42 USC Sect. 1985(3) (see Appendix at page M-4), this court cannot avoid the implications of its rationale in *Griffen v. Breckenridge*, 403 U.S. 88, 29 L.Ed.2d 338, 91 S.Ct. 1790 (June 7, 1971) where, in upholding federal jurisdiction under the conspiracy section of the Civil Rights Act of 1871, in the case of conspiracies of private individuals to deprive the plaintiffs of civil rights involving racial discrimination, (43 USC Sect. 1985) Justice Stewart was required to examine the congressional purpose behind such legislation and concluded that *it was never the intent of Congress that the act should include conspiracies other than those showing some racial or perhaps otherwise class-based invidious discriminatory animus behind the conspirators' actions, at page 348:*

"It is thus evident that all indicators - text, companion provisions, the legislative history - point unwaveringly to 1985 (3)'s coverage of private conspiracies. That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, *they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.'* Id. at 485. The constitutional shoals that would lie in the path of interpreting § 1985 (3) as a general

federal tort law can be avoided by giving full effect to the congressional purpose - *by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.* See the remarks of Representatives Willard and Shellabarger, quoted supra, at 100,29 L.Ed.2d, at 347. The language requiring intent to deprive of equal protection, or equal privileges and immunities, *means that there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action.* The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." (Our emphasis)

Stewart grounded the 1971 decision upon three factors: (1) the plain language of 42 USC Sect. 1985; (2) *the statutory scheme of the 1871 Civil Rights Act, taken as a whole (42 USC Sect. 1983 and 1985) and (3) the legislative history of the Civil Rights legislation in 1871.* In examining the plain language of Section 1985, Stewart noted the failure to include the same phrase "under color of law," used in Section 1983, and remarked at page 345:

> "Indeed, the failure to mention any such requisite can be viewed as an important indication of Congressional intent to speak in Section 1985(3) of all deprivation of 'equal protection of the laws' and 'equal privileges and immunities under the law,' whatever the source."

Analysing the statute further, he examined the Civil Rights legislation *as a whole* (Sections 1983 and 1985) and noted at page 346:

> "An element of the cause of action established by the first section, now 42 USC Sect. 1983, is that the deprivation complained of must have been inflicted under color of state law. *To read any such requirement into section 1985(3) would thus deprive that section of all independent effect. . . .Given the existence of these three provisions, it is almost impossible to believe that Congress intended, in the dissimilar language of that portion of section 1985(3) now before us, simply to duplicate the coverage of one or more of them..."* (our emphasis)

2. Pursue, Ltd. Has Failed to State a Cause of Action Under 42 USC, Section 1983.

Since Sections 1985 and 1983 were enacted together as part of an integrated statutory scheme and must be read together, and if it was never the intent of Section 1985 to reach other than "racial, or perhaps otherwise class based, invidious discriminatory animus", then certainly the reach of Section 1983 is no broader and certainly does not justify making the federal district courts a trial court forum to litigate public nuisance lawsuits, lacking in racial or class based invidious discriminatory animus.[4A] Particularly must this be so, where, as in the case of suppression of public nuisances, an important governmental interest is being furthered and local government is attempting to discharge its historic responsibility to the community to maintain a healthy moral climate. To construe the Civil Rights Act as functioning differently in such a case would fly in the face of a contrary policy enunciated by the United States Supreme Court in relation to the suppression of public nuisances, at the time of the enactment of the Civil Rights Act. See *James Phelan v. Commonwealth of Virginia*, 12 L.Ed.2d 1030 (1850) where the court stated at page 1033:

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government . . . .
>
> "It is a principle of the Common Law, that the King cannot sanction a nuisance . . . ."

[4A] There is a very serious question whether Congress intended that federal district judges should have the right under the Civil Rights Act of 1871 to interfere with State Court proceedings on matters relative to public morals. Compare the statement of U.S. District Judge Don J. Young, a member of the three-judge panel herein, as reported in the weekly Variety News dated Oct. 16, 1974 that "There isn't anything that I have read in the Ohio Statutes (against alleged obscene activities) that says you shouldn't expose your private parts in public,". . . "I don't think it is very good taste to do that, but if somebody likes to do it and somebody likes to watch somebody do it, that seems to me to be a harmless occupation. . . " (See copy at Appendix E to this Brief).

In light of *Phalen v. Commonwealth of Virginia, supra,* the broad language of Justice Brennan's opinion in *Steffle v. Thompson,*[5] ___US___, 39 L.Ed.2d 505, ___S.Ct.___, at page 517 and 518 (Mar. 19, 1971) with its emphasis on "the "the great impulse of national feeling born of the Civil War", cannot logically be read to authorize the type of federal interference indulged in herein by the U.S. District Court for the Northern District of Ohio under the guide of an 1871 "Civil Rights Action". To so hold would abnegate powers flowing from the Bill of Rights and Tenth Amendment which reserve to the States "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States. . . "

3. Mitchum v. Foster Does Not Foreclose a Ruling by This Court that 42 USC, Section 1983 Does Not Embrace a Civil Rights Action of the Sort Pleaded Herein.

This Court's ruling in *Mitchum v. Foster* 407 US 225, 32 L.Ed.2d 705, 92 S.Ct. 215 (June 19, 1972) did not hold that 42 U.S.C. Sect. 1983 embraces a civil rights action of the sort pleaded herein, i.e., against state officials for state action taken to abate as a public nuisance a business dealing in ob-

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[5] The inundation of obscenity cases involving federal interference which this court witnessed during the 1969-1972 Terms of Court (which provided, in part, the motivating force for this Court's decision in Atlantic Coast Inc. R. Co. v. Engineers 398 U.S. 281, 26 L.Ed.2d 234, 90 S. Ct. 1739 (June 8, 1970) and Younger v. Harris 401 U.S. 37, 27 L.Ed.2d 669, 91 S. Ct. 746 (February 23, 1971)) is certain to reappear as defense attorneys seek haven in the shelter provided by this Court's decision in Steffel V. Thompson. Appellants submit that a prosecutor cannot properly discharge his governmental responsibilities under the directorship of two judicial masters, one of which tells him an exparte search warrant is proper (Ohio v. Boyd) 35 Ohio App. 2d 147, 300 N.E. 2d 752 (December 18, 1972). Motion for leave to appeal denied by the Ohio Supreme Court on December 15, 1973, petition for certiorari denied in Boyd v. Ohio 41 L.Ed2 1175 (July 25, 1974) another which tells him an exparte search warrant is unlawful but a subpoena duces tecum will serve the same purpose (see Boyd v. Huffman No. 70-296, and the letter of Federal District Judge Don J. Young reprinted at Appendix B-1 thru B-6 in Brief in Opposition to Boyd v. Ohio No. 73-1339, supra) and a third of equal rank with Judge Young on the federal tribunal which tells him that the use of a subpoena duces tecum runs afoul of the fifth amendment. See Smith v. Fair and Huffman ___F2___(April 17, 1974) petition for cert. filed on July 11, 1974 in No. 73-2013.

scenity as a regular course of conduct. All that case decided was that the three-judge court below erred in its prefactory ruling in the abstract that the injunctive relief sought was unavailable since 42 U.S.C. Sect. 1983, under which that lawsuit was brought, was not an Act of Congress within the "expressly authorized" exception of the anti-injunction statute which would authorize a federal court to grant injunctive relief and stay proceedings in a state court.[6] Nor did this Court consider in *Mitchum, supra*, whether the plaintiff in that action, did, in fact, state a cause of action under 42 U.S.C. Sect. 1983. See *Farrell v. Joel, Jr.* 437 F.2d 160 (2nd Circuit, January 20, 1971), a civil rights case based upon 42 U.S.C. Sect. 1983 to review school administration practice, where Circuit Judge Feinberg, speaking for the 2nd Circuit (Lumbard, Feinberg, Clarie) noted at page 162:

> "Appellant assumes that his complaint states a viable action under the Civil Rights Act, 42 U.S.C. Sect. 1983, and its jurisdictional counterpart 28 U.S.C. Sect. 1343(3). *It is a measure of the change in the law over the past decade that the defendants and the district court did not question this assumption* . . . ." (Our emphasis.)

When this Court does undertake to decide this basic question, it must weigh in the balance this Court's past difficulties with federal interference in the obscenity and other areas of traditional state court activity during the past three terms of court, which culminated in its rulings restricting federal interference in *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 288, 26 L.Ed.2d 234, 90 S.Ct. 1739 (June 8, 1970), during the 1969 October Term and in *Younger v. Harris, supra; Samuels v. Mackell, supra; Boyle v. Landry, supra; Perez v. Ledesma, supra; Dyson v. Stein, supra; and Byrne v. Karalexis, supra*, during the 1970 October Term. It would be a tragedy were this Court to forget the incredible logjam which such federal interference has caused to this court's docket in the past.

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[6] See footnote 10 at page 59.

Appellants herein submit that any expansion of federal jurisdiction along the lines undertaken by the United States District Court for the Northern District of Ohio, Western Division, herein, will bring further chaos to obscenity litigation, will severely damage the state-federal court balance, and will further load this Court's docket.

IV.

THE THREE-JUDGE FEDERAL DISTRICT COURT ERRED IN FAILING TO GRANT APPELLANTS' MOTION TO DISMISS THE CIVIL RIGHTS COMPLAINT AND DISSOLVE THE TEMPORARY RESTRAINING ORDER.

A. Appellee's Civil Rights Complaint Failed to Allege the Highly Specific Facts Necessary to Defeat Appellants' Motion to Dismiss.

Appellant pleaded specific violations of specific state standards in the nuisance abatement action in the state trial court. See Paragraph 10 of the Complaint in the State Court (Appendix at pages C10-13)[7]

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[7] "10. That the exhibition of said motion picture films at the Cinema I hereinabove alleged constitutes a public nuisance as that term is defined in Section 3767.01 (C) of the Ohio Revised Code, which reads in part as follows:

"Section 3767.01 Definitions

As used in all sections of the Revised Code relating to nuisances:

(C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness . . . is conducted, permitted, continued, or exists, or any place, in or upon which . . . obscene films . . . are screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose."

for the following reasons:

(a) Visual depiction of the private parts of the body in public or the visual depiction of sex acts in public, whether real or simulated, is conduct which is contrary to good morals, public decency, and the long-standing public policy of the people of the State of

Common sense dictates that in a case such as this, where the state court complaint is highly specific as to the nature of the conduct complained against, that a federal

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Ohio as expressed by the State Legislature in enacting Sections 2905.01, 2905.03, 2905.08, 2905.19, 2905.30, 2905.31, 2905.35, 2905.44, and other Sections in the Ohio Revised Code.

(b) The conduct described in subparagraph (a) above, if performed offstage and in public in three-dimensional form, would constitute violations of the laws of the State of Ohio regulating public displays of such sexual activity, and that reproduction on the motion picture screen in public in two-dimensional form, in the matter indicated, is contrary to good morals and public decency and constitutes obscenity as a matter of law.

(c) Such conduct is demonstrated by the following visual depictions in the time and motion studies hereinbefore referred to as Appendices A -- F.

APPENDIX A. "Wow, It's Cindy" and "Hot Spurs". Lesbianism depicted on pages 1, 4 and 5; cunnilingus depicted on pages 1 and 6; sexual intercourse depicted on pages 1, 2, 6 and 8; auto eroticism depicted on page 3; group sex depicted on pages 4, 5 and 7; fellatio depicted on pages 6 and 8.

APPENDIX B. "Prostitution, Pornography U.S.A." and "Oddly Coupled". Masturbation depicted on page 2; sexual intercourse depicted on pages 2, 3, 5, 7 and 16; fellatio depicted on pages 3, 6 and 10; anal sodomy depicted on page 5; sexual sadism depicted on pages 5 and 6; lesbianism depicted on pages 11 and 12; cunnilingus depicted on page 15; group sex depicted on pages 20 and 21.

APPENDIX C. "Sandra, The Making of a Woman" and "Diamond Stud". Sexual intercourse depicted on pages 3, 6, 15 and 22; auto eroticism depicted on pages 5 and 6; cunnilingus depicted on on pages 7, 8, 14 and 21; lesbianism depicted on page 9; rape depicted on pages 10, 11 and 14.

APPENDIX D. "Midnight Plowboy" and "Tobacco Roody". Lesbianism depicted on page 8; sexual intercourse depicted on pages 8, 9, 10, 17, 18, and 20; cunnilingus depicted on page 14; fellatio depicted on page 28.

APPENDIX E. "The Blue Hour" and "The Grabbers". Lesbianism depicted on pages 7 and 8; sexual intercourse depicted on pages 7 and 13; auto eroticism depicted on page 12; group rape depicted on pages 12 and 13.

APPENDIX F. "The Exotic Dreams of Casanova" and "Sweet Georgia". Sexual intercourse depicted on pages 1, 2, 8, 9, 15, 16, 21, 22, 23 and 24; masochism depicted on page 4; auto eroticism depicted on pages 14 and 24; lesbianism depicted on pages 19 and 20.

complaint alleging violations of sections 1983 and 1985 must reply to the questioned conduct with equal specificity, in order to avoid a motion to dismiss. In Federal Civil Rights Act by C. J. Antieau, Section 83 at page 108, the above principle is stated as:

> "It is often said that in an action under Section 1983, the plaintiff must allege highly specific facts. It is not enough to state conclusory allegations without support of the facts alleged. Complaints have been dismissed where the allegations were broad, conclusory and unsupported by factual allegations. *Weyandt v. Mason's Stores, Inc.*, (1968, D.C. Pa) 279 F. Supp. 283; *Sinchak v. Parente* (1966, D.C. Pa) 262 F. Supp. 79; *Pugliano v. Staziak* (1964 D.C. Pa) 231 F. Supp. 347, aff'd (CA3) 345 F2 797; *Negrich v. Hohn* (1967, CA3 Pa3) 379 F2 213 *Finley v. Rittenhouse* (1969, CA9 Cal) 416 F2 1186."

The federal district court did not have before it the same factual situation which faced the three judge court in *Scheuer v. Rhodes* ___US ___, 40 L.Ed.2d. 90, 94 S.Ct. ___(April 17, 1974) where this Court, in reversing the dismissal of a civil rights action under 42 USC sect. 1983, had occasion to hold at 104:

> "This case in its present posture. . .because of the absence of a factual record, does (not) permit a determination as to the applicability of the foregoing principles to the respondents here. The District Court acted before an answer was filed and without any evidence other than the copies of the proclamations issued by Respondent Rhodes and brief affidavits of the Adjutant General and his assistant. In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that 'mob rule existed at Kent State University.' There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no

evidence before the Court from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed. . .

"The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaint places directly in issue whether the lesser officers and enlisted personnel of the Guard acted in good faith obedience to the orders of their superiors. Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint."

B. The Federal District Court Erred in Failing to Take Into Consideration Appellee's Course of Conduct Which Was Alleged in the Pursue, Ltd. Complaint (And Proved in the State Court Action). Such Admitted Facts Showed a General Disability to State a Claim Upon Which Federal Relief Could be Based.

The amended complaint in *Ohio ex rel Huffman v. Dakota et al.*, 72 CIV 0326, with its specific pleadings and the autoptical evidence of seven time-motion studies (which were pleaded by incorporation in the complaint) was before the court as a part of the complaint in *Pursue, Ltd. v. Huffman et al.* C72-432, for the following reasons:

The complaint in Pursue, Ltd. v. Huffman, et al., C72-432, adopted by reference (Appendix at page J-8, Para. 14) the complaint in Dakota v. Fair et al., C72-384, which incorporated by reference (Appendix F-4, 5, at

Para. 7) the complaint in Ohio ex rel Huffman v. Dakota et al., 72 CIV 0326 (see Footnote 3).

In its ruling as to whether a cause of action had been stated in the first instance, the federal district court erred in failing to consider the facts as alleged by Pursue Ltd., that is, the trial court's examination of appellee's course of conduct extending over several months, and its examination of 16 motion picture films which had been exhibited at the theatre during that period of time, which films such court ruled were obscene under specific state standards as to what the term "obscene" legally encompassed.*

The test to be applied, in judging the sufficiency of a complaint under 42 U.S.C. section 1983, was reviewed by this Court in *Scheuer v. Rhodes, supra,* at page 96:

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.
>
> '(I)n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson,* 355 U.S. 41, 45 (1957) (footnote omitted).

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* See factual allegations in Pursue Ltd. Complaint, at paras. 14-18 (Appendix at pages J8-9).

See also *Gardner v. Toilet Goods Assn. Inc.*, 387 U.S. 167, 172 (1967)."

Construing the allegations of the complaint favorably to the Appellee, it still remains beyond doubt that under the allegations, Appellee could not prove a set of facts in support of his claim which would entitle him to relief.[9]

1. Where the Appellee's Course of Conduct as Admitted in the Complaint Posed no Constitutional Question, a Trial Court Should Not Litigate Legal Facts in the Abstract.

Paralleling the legal consideration as to whether a three-judge court should have been impaneled and the concomitant jurisdictional requirement that a substantial federal question be raised as to the constitutionality of the State Statute, in the first instance, (*Idlewild Bon Voyage Liquor v. Epstein* 370 U.S. 713, 8LEd.2d. 794, 796, 82 S. Ct. 1294 (June 25, 1962), infra, at page 42), is the legal question for the trial court as to whether the constitutional question posed has application to the situation under litigation. In other words, a court will not litigate legal rights in the abstract. *United States v. Raines*, 362 U.S. 17, 4 L.Ed.2d 524, 80 S.Ct. 519 (Feb. 29, 1960). The *Raines* case concerned an action by the United States against members of the Board of Registrars and others of Terrell County, Georgia, under the Civil Rights Act of 1957, 42 U.S.C., § 1971. The United States District Court held 42 U.S.C. § 1971 (c) unconstitutional and dismissed the complaint. In reversing that court, the Supreme Court (Justice Brennan speaking for seven members, Frankfurter and Harlan concurring) held at page 529 that this Court, as is the case with all federal courts:

[9]Further, that which was obvious under the pleadings was borne out by the subsequent failure of Pursue Ltd. to produce such evidence at the hearing on the motion to dissolve the temporary restraining order and to dismiss. (Appendix at pages O-3 and Z-27). When a pleader fails in such proofs, the Court should dismiss the Complaint. See Federal Civil Rights Acts by C. J. Antieau, at page 110.

> ". . . 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of the litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . .' Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional . . . ."

Out of respect for the police powers reserved to the people in the Bill of Rights, the federal district court had the duty and obligation, under such circumstances to refrain from formulation of a rule of constitutional law broader than was required by the precise facts to which it is applied. *United States v. Raines*, supra.

C. THE THREE-JUDGE FEDERAL DISTRICT COURT SHOULD HAVE DISMISSED THE CIVIL RIGHTS COMPLAINT AS A SHAM PLEADING BROUGHT IN BAD FAITH WHEN IT WAS BROUGHT TO THAT COURT'S ATTENTION THROUGH THE AFFIDAVITS IN SUPPORT OF APPELLANTS' MOTION TO DISMISS THAT HARD-CORE PORNOGRAPHIC FILMS WERE CONTINUOUSLY BEING EXHIBITED AT THE CINEMA I THEATRE UNDER THE PROTECTION OF THE FEDERAL DISTRICT COURT'S TEMPORARY RESTRAINING ORDER OF DECEMBER 1, 1972.

The basis for the issuance of U.S. District Court Judge Walinski's temporary restraining order on Dec. 1, 1972, to wit: "to prevent great and immediate harm to the plaintiff", as pleaded by Appellee Pursue Ltd. was false and fraudulent.

Appellants attached to the memorandum in support of the motion to dissolve the temporary restraining order and to dismiss and incorporated therein by reference Exhibits A, B, and C being affidavits of persons who had seen the motion pictures exhibited by Appellee at the Cinema I Theater, #69 Public Square, Lima, Ohio, for three successive weeks, January 10 - 30, 1973, together with photographic reductions of time-motion studies of said motion picture films. The original time-motion studies were made available to Appellee Pursue Ltd.'s counsel in the Clerks Office, having been previously filed therein. In light of such uncontradicted declarations as to the nature of Appellee's operations in January of 1973, during the month *after* Common Pleas Judge Lights Permanent Injunction of Nov. 30, 1973, and U.S. District Judge Walinski's temporary restraining order of Dec. 1, 1972, Appellee Pursue Ltd.'s contention that great and immediate irreparable harm would be sustained in that the Appellant law enforcement officers sought through the state court to interfere with the exhibition of "constitutionally protected" motion picture films at the Cinema I Theater must be deemed, in Equity, to be fraudulent as a matter of law.

Appellants contend that the Court should have dismissed the complaint as a sham pleading brought in bad faith; which, when combined with the petition for removal filed with this Court in Case No. C72-445, constituted a gross abuse by Appellee of the federal judicial process.

> "A sham pleading is defined as one that while in good form is false in fact, or one good in form but false in fact and not pleaded in good faith." 61 Am Jur 2d, Pleading, Section 26, page 474.
>
> "It has always been held that by virtue of its inherent power, the court has authority by summary means to prevent an abuse of its processes and peremptorily to dispose of causes of action or defenses that are sham, frivilous, or wholly vexations." 61 Am Jur 2d, Pleading, Section 211, page 631.

While Appellee's complaint may be in "good form", it is "false in fact" as evidenced by Appendices, P, Q and R. Appellee used the federal judicial process fraudulently (1) by filing a complaint claiming that it was exhibiting "constitutionally protected" films; (2) by obtaining a temporary restraining order on the same basis and falsely representing a fear of great and immediate irreparable harm and (3) by filing a sham petition for removal in *Dakota v. Huffman* No. C 72-445 thereby terminating the jurisdiction of the state court when Appellant Huffman attempted to comply with the federal court's order and afford plaintiff a prior adversary hearing as to obscenity.

Appellee's complaint was not brought in good faith as evidenced by the continuous exhibition of obscene films and the filing of the petition for removal one day before the prior adversary hearing to determine obscenity in the state court under the guidelines of the previous federal order.

Appellants need not dwell upon the obscenity of the motion picture films exhibited by plaintiff at the subject premises. Appendices P, Q, and R speak for themselves. The depths to which the pornography peddlers like plaintiff have fallen in the area of obscene motion pictures is best illustrated by the language used by the Court of Appeals for Lucas County in *State ex rel Ewing v. "Without a Stitch"*, 28 Ohio App 2d 107 at page 112.

> "By any test, medium core, hard core, as if res ipsa loquitur, obscenity per se, patently obscene, or screaming obscenity, the film (Without a Stitch) was obscene."

To permit Appellees to commercially exploit sex under the pretense of freedom of expression worked an injustice on the people of the State of Ohio in whose name the state action was brought and abused the federal court process.

1. The Doors of a Court of Equity Should be Closed to the Unclean Litigant. Equity Will Not be the Abettor of Iniquity.

Further, the prayer of Pursue, Ltd. for equitable relief was confronted by the ancient maxim of equity that a "man must come into a court of equity with clean hands." *Eyre, C. B. Dearing v. Earl of Winchelsea* (1787); Cox Eq. 318, 319. On this matter Federal District Judge Cox, speaking for the three-judge court (2-1) in *Irene McGrew, et al. v. City of Jackson, Mississippi,* 307 F. Supp. 754 (Dec. 31, 1969), said the following at page 765:

> "None of these plaintiffs have any standing in this court under the clean hands doctrine to successfully seek a recovery of that film./*10*"

At footnote 10 of Judge Cox's opinion are cited excerpts from one Supreme Court decision and two Circuit Court of Appeals decision:

> "10. Precision Instrument Mfg. Co. et al. v. Automotive Machinery Co., 65 S.Ct. 993 provides:
>
> " 'The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abetter of iniquity." Bein v. Heath, 6 How. 228, 247, 12 L.Ed. 416. Thus while "equity does not demand that its suitors shall have led blameless lives," Loughren v. Loughren, 292 U.S. 216, 229, 54 S.Ct. 684, 689, 7 L.Ed. 1219, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245, 54 S.Ct.

146, 147, 78 L.Ed. 293; Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387, 64 S.Ct. 622, 624, 88 L.Ed. 814; 2 Pomeroy, Equity Jurisprudence (5th Ed.)§ 397-399. This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." Keystone Driller Co. v. General Excavator Co., supra, 290 U.S. 245, 246, 54 S.Ct. 147, 148, 78 L.Ed. 293. Accordingly, one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor. Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants, this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance. See Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 492-494, 788 (sic), 62 S. Ct. 402, 405, 406, 86 L.Ed. 363.

"To the same effect is Karl E. Stiegele and Speidel Corp. vs. J. M. Moore Import-Export Co., Inc., (2CA) 312 F.2d 588.

"New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc. (5CA) 291 F.2d 471, the court said:

" 'Without considering the legal issues on the merits, we affirm the judgment of the trial court. We do so by application of the age-old, but sometimes overlooked, doctrine that "he who comes into equity

must come with clean hands.' "

"Earle R. Hanson & Associates v. Farmers Cooperative Creamery Company of Clear Lake, Wisconsin, (8CA) 403 F.2d 65, provides:

" 'The misconduct need not be of such a nature as to be actually fraudulent or constitute a basis for legal action. The plaintiff may be denied relief where his conduct has been unconscionable by reason of a bad motive, or where the result induced by his conduct will be unconscionable either in the benefit to himself or the injury to others. Johnson v. Freberg, 178 Minn. 594, 228 N.W. 159, 160 (1929). Cf Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 815, 65 S.Ct. 993, 89 L.Ed. 1381 (1945); Pope Mfg. Co. v. Gormully & Jeffrey Mfg. Co., 144 U.S. 224, 236-237 12 S.Ct. 643, 36 L.Ed. 426 (1892); Kool Vent Metal Awning Corp. of America v. Bottom, 205 F.2d 209 (8 Cir. 1953).' "

V.

THE PLEADINGS ON FILE IN THE FEDERAL DISTRICT COURT FAILED TO RAISE A SUBSTANTIAL FEDERAL QUESTION FOR THE INVOCATION OF A THREE-JUDGE FEDERAL DISTRICT COURT TO CONSIDER THE CONSTITUTIONALITY OF THE OHIO NUISANCE STATUTE.

By order dated December 11, 1972, the Sixth Circuit Court of Appeals designated a three-judge district court to consider the constitutional claims of Pursue, Ltd. (See Appendix at pages L22-23). In that designation, the Court of Appeals stated:

"This designation and composition of the three-judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-judge rather than a one-judge court. This is a matter best determined by the three-judge court. . . ."

Under this Court's rulings in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 8 L.Ed.2d 794, 796, 82 S.Ct. 1294 (June 25, 1962), the case should have been dismissed by the three-judge court for failure to raise a substantial federal question.

The constitutionality of O.R.C. Sections 3767 et seq. depends upon a pragmatic assessment of its operation in the particular circumstances. In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S.Ct. 1325 (June 24, 1957) this Court in dealing with a like situation held at page 1474:

> "The judicial angle of vision in testing the validity of a statute like § 22-a is 'the operation and effect of the statute in substance. . . .' The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties. 'What is needed,' writes Professor Paul A. Freund, *'is a pragmatic assessment of its operation in the particular circumstances.* The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to a more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539 - 354 U.S. 441, 442 (emphasis added.)"

Appellants submit that where specific pleadings demonstrate on their face that a party is dealing in obscenity per se, it is plain error to rule that a substantial federal question is raised for the invocation of a three-judge court. See *Paris Adult Theater v. Slaton* 413 US 49, 37 L.Ed.2d. 446, 456, 93 S.Ct. 2628 (June 21, 1973); *Kaplan v. California*, 413 US 115, 37 L.Ed.2d. 492, 498, 93 S.Ct. 2680 (June 21, 1973) *Womack v. U.S.* 294Fd. 204 Jan. 12, 1961), cert denied in 365 U.S. 859, 81 S.Ct. 826, 5L.Ed. 2d 822 (Mar. 27, 1961). See also Point IV B, supra, at page 49 and *Miller v. Reddin*, 293 F Supp. 216, at 229 (Nov. 18, 1968) wherein Federal District Judge Hauk, after examining the materials there involved, held that jurisdiction did not lie in a three-

judge court, the court saying:

> "As such, each of the five books is clearly, unequivacally and uncontrovertibly obscene and pornographic in the hard core sense, and reasonably comes within the ambit and purview of the obscenity statute. . . "Thus it is impossible for the court to find any substantial federal question. . . ."

Though not considered by the federal court in its decision, the proof before the three-judge court as., acknowledged in the three-judge Federal District Court's opinion (Appendix, page A-10) demolished all claims of "extraordinary circumstances". The state trial court's finding of a public nuisance in *State of Ohio ex rel Huffman v. Dakota*, 72 CIV 0326, was based upon an examination of 16 motion picture films by the Allen County Common Pleas Court, the obscene nature of which was specially pleaded and apparent upon the face of the complaint on file in the state court, which pleadings had been removed to the federal court on December 11, 1972. Further, the federal three-judge court had before it evidence in the form of affidavits appended to the trial brief filed on January 16, 1973 (see Statement of Facts, page 17 and Appendix at pages N3-12) and appended to the Motion to Dismiss filed on February 12, 1973 (see Statement of Facts, page 19 and Appendix, at pages O3-16, P2-39, Q4-41, and R6-51), which established, as matter of law, that *Pursue, Ltd.* was still maintaining the public nuisance on Jan. 10-30, 1972 and at the time of the federal court hearing on March 12, 1973.

VI.

THE PLEADINGS ON FILE IN THE FEDERAL DISTRICT COURT PROVIDED NO BASIS FOR EQUITABLE JURISDICTION AND FEDERAL INTERVENTION.

A. The Jurisdictional Requirement of Younger v. Harris and Mitchum v. Foster have not been met.

The equitable principles which govern interference by federal courts in criminal and civil proceedings pending in state courts were laid down by this Court in *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (Feb. 23, 1971), and *Mitchum v. Foster*, 407 U.S. 225, 32 L.Ed.2d 705, 92 S.Ct. 2151 (June 19, 1972).

In *Younger v. Harris, supra*, this Court established the equitable principles which are to govern interference by federal courts in pending *criminal* matters. There it was held that it would take "exceptional circumstances" to warrant a federal court's enjoining state proceedings where a state prosecution was already pending at the time the federal action was filed; that in general, the plaintiff *must allege and prove* not only "irreparable injury," the traditional prerequisite for injunctive relief, but in addition, that the danger of irreparable injury is both "great and immediate," which normally requires that plaintiff show bad faith and an intention to harrass on the part of the prosecuting officials, as was established by the pleadings in *Dombrowski v. Pfister, 380* U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965); further, that where the prosecution is undertaken in good faith, and not for purposes of harrassment, a federal court may not properly enjoin enforcement of a statute solely on the basis of a showing that the statute "on its face" abridged First Amendment rights, absent "extraordinary circumstances." In *Samuels v. Mackell*, 401 U.S. 66, 27 L.Ed.2d 688, 91 S.Ct. 764 (Feb. 23, 1971), those same standards were adopted where the federal relief sought in such situations was the issuance of a declaratory judgment.

In *Mitchum v. Foster, supra*, this Court was faced with a fact situation involving abatement proceedings brought under the civil law, similar to the proceedings herein. While that decision dealt with a more basic issue[10], the majority opinion did

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[10]Appellants seriously question the rationale and correctness of this Court's decision in Mitchum v. Foster that the century old Civil Rights Act of 1871 (42 U.S.C. section 1983), with the broad reach given to it by this Modern Court, comes within the "expressly authorized" exemption of the 1948 anti-injunction statute (28 U.S.C. section 2283). The continuing refusal of this Court to so hold in the face of repeated

observe that the above equitable principles regulating interference in criminal cases expressed in *Younger, supra,* also restrained interference by a federal court in civil cases pending in state courts, at page 718.

> ". . . we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in Younger v. Harris . . . ."

The facts as pleaded in the complaint show: (1) That the statute under which the civil action was brought had been upheld, *pro tanto,* against a broad attack on the statute, by a three-judge Federal District Court in the same district wherein the federal relief was sought, *Grove Press, Inc. v.*

challenges up to and including Younger v. Harris, 401 U.S. 37, 27 L.Ed. 2d 669, 91 S.Ct. 746 (Feb. 23, 1971), and its companion cases, indicates that the answer was not as easily reached as the unanimous court in the Mitchum opinion suggests. See the concurring opinions of Justices Harlan and Stewart in Younger, supra, at 681.

While the Mitchum rationale states, at page 714, that the "relevant criteria" for making that determination are three in number, the language is deceptive in that only one real criterion is stated positively, namely:

> "Whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given the intended scope only by the stay of a state court proceeding. . . (our emphasis.)

The difficulty this test presents is brought into focus by asking the searching question - just how "clear" is the federal right; i.e., how broad is the reach of section 1983? Is it to be limited to racial bias and invidious discrimination, or does it extend across the board to public nuisance litigation? Compare Griffin v. Breckinridge, 403 U.S. 88, 29 L.Ed.2d 338, at 348, 91 S.Ct. 1790 (June 7, 1971) .As the reach is broadened to include the right of a professor to reinstatement after refusing to comply with a school dress code. (See Appendix E) the federal right becomes not so clear.

Flask, 326 F. Supp 574 (Mar. 10, 1970), vacated and remanded on other grounds in *Grove Press, Inc. v. Flask* 414 US__, 37 L.Ed.2 1013, 93 S.Ct.__ (June 21, 1973) and (2) that the civil action was brought by petitioner as the prosecuting attorney for Allen County under the compulsion of O.R.C. Section 3767.03, and (3) that the judgments of the state trial court on the issue of "public nuisance" were favorable to the petitioner in the hearings on both the preliminary injunction, entered October 24, 1972, and on the final injunction, entered November 30, 1972, both of which determinations were alleged on the face of the complaint. Appellants submit that a finding that the pleadings herein raised issues of "bad faith" and "harrassment" would be reversible error.

The inescapable conclusion to be drawn from the principles expressed in *Younger and Mitchum* and the facts stated in the complaint on file herein is that a case for federal relief by way of equitable interference has not been stated by Appellees. Where, as noted above, it must be held as a matter of law that petitioners acted in good faith and not for purposes of harrassment, a case for federal relief based upon "danger of irreparable injury being great and immediate" is unavailable.

Nor can appellee claim a case for federal relief on the alternative grounds that (1) the statute on its face abridges First Amendment rights, and (2) that "extraordinary circumstances" exist; for neither of the latter two elements of proof exist. An examination of O.R.C. Section 3767 et seq show it to be constitutional on its face. *Grove Press, Inc. v. Flask, supra*, Further, a civil statute requiring a forfeiture for a period of one year of the leasehold interest in the property used in conducting or maintaining a public nuisance, as a civil penalty, after trial on the merits and a finding by the trial court that a public nusiance exists, is entirely constitutional. *U.S. v. U.S. Coin and Currency. One Lot of Emerald Cut Stones and One Ring v. U.S.*, 409 U.S. 232, 34 L.Ed.2d 438, 93 S.Ct. 489 *Astol Calero-Toledo, Supt. of Police et al v. Pearson Yacht Leasing Co.*___US ___, ___L Ed.2d ___, ___S.Ct.___ (May 15, 1974).

B. The Trial Facts Do Not Warrant an Application of the Rules Stated in Steffel v. Thompson.

Until *Steffel v. Thompson*, ___ US___ , 39 L.Ed.2d 505, 94 S. Ct. ___was decided, it was to be expected that, based solely upon this Court's rulings in *Younger and Mitchum* (and independent of other arguments made herein), Appellee Pursue Ltd. should have a difficult time presenting an arguable basis for federal relief of any kind. This Court's decision on March 19, 1974 raises an additional issue. Can a Pursue type organizational plaintiff now pull over itself the cloak of "Steffel" and, with its argument of "threatened state action", sneak into a Federal court room, through doors which had previously barred its entry.

Steffel v. Thompson has the practical effect of weakening this Court's policy of limiting federal interference in state court actions. It should not be extended to "in rem" public nuisance actions or obscenity litigation where it would create a direct conflict with other policy decisions of this Court.

1. Steffel v. Thompson Should Not be Extended to "In Rem" Public Nuisance Actions Where it Would Create a Conflict in 28 USC, Section 2283.

In *Younger v. Harris* 401 U.S. 37 and its companion cases, Justice Black, speaking in the background of a court docket loaded with federal interference cases, expressed a strong policy favoring principles of federalism. As applied to declaratory judgments, that policy of non interference in criminal prosecution's was voiced in *Samuels v. Mackell* 401 U.S. 66, 27L.Ed.2d. 688 at 694, 91 S.Ct. 674 as:

> "We can perceive no relevant difference between the two situations with respect to the limited question whether, in cases where the criminal proceeding was begun prior to the federal civil suit, the propriety of declaratory and injunctive relief should be judged by essentially the same standards. In both situations

deeply rooted and long settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid. This is true for at least two reasons. In the first place, the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce by granting 'further necessary or proper relief,' 28 USC § 2202, and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to 'protect or effectuate' the declaratory judgment, 28 USC § 2283, and thus result in a clearly improper interference with the state proceedings. Secondly, even if the declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would. As we said in the Wycoff case, 344 US. at 247, 97 L.Ed. at 298:

> 'Is the declaration contemplated here to be res judicata, so that the (state court) cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State (court) before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.' "

Were this Court to apply *Steffel v. Thompson*, so as to authorize a federal declaratory judgment in situations such as *Pursue, Ltd. v. Huffman*, C72-432, where an "in rem" public nuisance abatement action is already in train in the state court, such would create a more direct conflict with 28 USC, Section 2283 than that referred to above by Justice Black in *Samuels v. Mackell, supra*. See Point II, *supra*, at page 34 and *Orton v. Smith*, 18 How. 263, 15 L.Ed.2d 393 (Feb. 28, 1856), discussed at page 35. Further, were a federal

declaratory judgment to be issued under *Steffel v. Thompson*, the accompanying right under 28 USC, Section 2283, to issue an injunction to "protect or effectuate" the declaratory judgment would conflict with the duties under the same federal statute *not* to issue an injunction under the "in rem" exception based upon lack of subject matter jurisdiction.

2. Steffel v. Thompson Should Not be Extended to Obscenity Litigation Where it Would Conflict With the Policy Expressed by This Court in Miller v. California, 413 US 15, 37 L.Ed.2d 419, 93 S. Ct. 2607 (June 21, 1973).

The rule of law formulated by this court in *Miller v. California* effectively precludes the application of *Steffel* to obscenity litigation. Under *Miller* the states are to be the *first* to define what specific sexual conduct is to be proscribed under state law as written or "authoratatively construed." Were the federal courts to be allowed to apply that construction, the status of obscenity litigation would be returned to the same position it occupied before *Miller, and* would effectively prevent the application of local standards.

Further, Appellants submit that, if allowed, *Steffel v. Thompson* will be employed by defense attorneys in a manner which will undermine the spirit of *Younger et al.* and enable Federal District Courts to accomplish indirectly that which *Younger, supra,* and *Mackell, supra,* sought to avoid. See *Steffel, supra,* at page 513, footnote 7, and page 517. The attention of this Court is invited to the manner in which Federal District Judges Ferguson, East, and Circuit Judge Ely used *Steffel* to undermine the legitimate efforts of California law enforcement to stop the exhibition of "Deep Throat" in Orange County. See their decision rendered on June 4, 1974, in *Miranda v. Hicks,*____F. Supp. ___, a copy of which is attached to this brief at Appendix B.

It would appear that, unless limited, *Steffel* will present an open invitation to prospective defendants and defense attorneys to participate in a race to the courtroom, so as to engage the State on two fronts. That courtroom encounter can

be broadened to as many "fronts" as there are divisions of the federal courtroom system within the State. The diversified preliminary results which can be expected from the separate divisions (f. *Cinn. Properties v. Leis* at Appendix A to this Brief) can be further confused by conflicting rulings between judges within the same court. (See footnote 5 on page 42.) If that were not bad enough, additional plaintiffs can now be manufactured so as to increase the odds for a favorable result in this game of Russian roulette. See *Miranda v. Hicks, supra.*

C. A Federal Court Has No Power to Interfere With State Appellate Proceedings.

1. The Federal District Court May Not Stay Proceedings in a State Court After a Final Judgment Has Been Entered in the State Action.

The state procedures on enforcement of final judgments and appellate practice have been frustrated. Under Ohio Rules, the appellate process begins with the entry of a final judgment in the trial court, a fait accompli herein. To commence an appeal, a notice of appeal must be filed within 30 days after the entry of the final judgment. Ohio Rules of Appellate Procedure, rule 4(A) *Pursue, Ltd.* has elected not to appeal the state court judgment and the fact findings made by the trial court regarding the property interests *under which they claim* herein. Accordingly, under Ohio law, that final judgment represents the law of the case. *Independent of the question of the legal correctness of the federal court interference,* fact findings (2) and (3) of the Allen County Common Pleas Court, regarding the status of property at 69 Public Square, reading:

> "(2) That defendant, William H. Dakota, has engaged in a course of conduct of displaying motion picture films at said Cinema I Theatre which are obscene as (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or rep-

resentation of sexual matters: and (c) the material is utterly without redeeming social value, all three elements coalescing.

(3) That this conduct and the continuous exhibition of obscene motion picture films by the defendant constitutes a nuisance as defined by Section 3767.01 (c) of the Revised Ohio Code: . . . ."

which were not affected by such federal court interference. *are entitled to recognition.*

At pages 8 and 9 of their Brief in Opposition to Appellant's Application for a Stay Order or Writ of Injunction in *Huffman et al v. The United States District Court for The Northern District of Ohio et al* No. 72-1613. Appellees deny the finality of the State trial court judgment and place in question just what is the law of that case:

> "the order of the Allen County Court is final, insofar as it has not been modified by the opinion and order of the statutory three-judge court filed April 20, 1973 (see Appendix A-3, at A-12 of the 'Extra ordinary petition'), where the Court said in part as follows:
>
> > 'Defendant (Petitioners herein) are therefore enjoined from executing that portion of the Allen County Common Pleas Court's Judgment of November 30, 1972, which orders the closing of Plaintiff's (Respondent herein) theatre pursuant to O.R.C. §376706.' "

But how shall the state of Ohio proceed to execute that portion of the final judgment which is not now subject to attack, so as to apply Ohio justice to the case of a declared violation of the law? Or for that matter, how may the State of Ohio perfect its trial court victory in such litigation, ie., the valid findings of the state court re the existence of a public nuisance, in either the state or the federal appellate systems? Where Pursue, Ltd. has refused to appeal from the final judgment of the Common Pleas Court, may petitioners do so in the state court? Clearly not, for the findings there were favorable! Further, on an appeal within the federal

system, how may the State of Ohio preserve the Common Pleas Court's factual findings re the existence of a public nuisance, where the three-judge Federal District Court refused to consider such evidentiary matters in their disposition of the case.

By interfering with the final judgment herein, the three-judge Federal District Court has prevented the development of even Justice Douglas' "concurrent jurisdiction to collision". See *Byrne v. Karalexis*, 396 US 976, 24 L.Ed.2d 447, 90 S.Ct. 469 (Dec. 15, 1969, Justice Douglas dissenting at page 486. There is and can be no parallel appeal taking place within the state system. It would appear that the "collision" upon which Justice Douglas reflected, has already come to pass herein. Under the laws enacted by the Ohio Legislature and the decisions rendered thereon by the Ohio judiciary, petitioners have a duty, and should be able to enforce the final judgment of the Common Pleas Court of Allen County, Ohio, of November 30, 1972, as to which no appeal was perfected, which requires that the Cinema I Theatre be closed as a public nuisance, being a disorderly house which regularly exhibits obscene motion picture films as a course of conduct. Section 3767.05 defines that duty as follows:

> ". . . if the existence of a nuisance is established on the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from *further maintaining the nuisance*. . . ." (Our emphasis)

Section 3767.06 also provides, in part, as follows:

> ". . . if such innocence is established, such unsold personal property and contents shall be delivered to the owner, *otherwise it shall be sold*, as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; *and for closing the place and keeping it closed*, a reasonable sum shall be allowed by the court. . . ." (Our emphasis)

In carrying out those duties, appellants have been placed upon the horns of a dilemma in that they are faced with the

possibility of being held in contempt of the federal order of judgment herein which, if followed by appellants, would require them to be guilty of nonfeasance in the performance of their duties as state law enforcement officers.

2. **A State Court May Not Be Removed to the Federal District Court After Final Judgment. The Opinion and Order of the Three-Judge Federal District Court on April 26, 1973, Sua Sponte Dismissing the Removed State Action, William Dakota et al v. State of Ohio, ex rel Lawrence S. Huffman, 72 CIV 445 at Moot, Was Null and Void.**

For the Federal Court to acquire jurisdiction *over the Public Nuisance action and* the *res* under the circumstances herein prevailing, it would have been necessary to remove the entire state action to the federal court in a removal action authorized by 28 U.S.C. Sect. 1441 or 1443. The removal action in *State of Ohio ex rel Huffman v. Dakota,* however, was untimely, not having been filed until Dec. 11, 1972, at which time the Allen County Common Pleas Court had already handed down its final judgment of Nov. 30, 1972, on the matter."

The statutory scheme for Removal of Actions to the federal court requires that the petition for removal of a civil action or proceedings shall be timely filed. 28 U.S.C. sect.

"Service of the amended complaint was affected on Sept. 25, 1972 and, on Nov. 30, 1972, the Allen County Common Pleas Court entered a permanent injunction in State of Ohio ex rel Huffman v. Dakota, C72-0326, (see Statement of Facts at page 13 and Appendix at pages I3-7). On Dec. 11, 1972, Robert Hollis, President of Pursue, Ltd., as successor to the interest of William Dakota, filed a petition for removal in the federal district court entitled Dakota v. State of Ohio ex rel. Huffman, C72-445, (see Statement of Facts at page 16, and Appendix L, pages 3-7), effecting its removal from the state court. On April 26, 1973, respondent three judge federal district court, sua sponte, entered an order of judgment, dismissing the case as moot (see footnote 2 at page 16 and Appendix at S-3).

1446(b). 76 C.J.S. Removal of Causes, section 182 et seq. at pages 1045 - 1055. Where no right of removal exists, any action or proceedings by such court looking toward a determination of the controversy is of no force or effect and any findings or orders made by it, other than an order of remand are null and void, 76 C.J.S. Removal of Causes, section 182 at page 1045 and section 240 at pages 1106 - 1107. See also footnote 2 at page 16 supra.

Further, appellants know of no authority which permits the removal of a state case *after* final judgment. To countenance that procedure would interfere with the state appellate process which commence upon the entry of the final judgment.

VII.

SECTIONS 3767.04 AND 3767.06 OF THE REVISED CODE ARE CONSTITUTIONAL ON THEIR FACE AND AS APPLIED BY THE ALLEN COUNTY COMMON PLEAS COURT TO THE CONDUCT HEREIN.

A. The Federal District Court Erred In Its Ruling That the "Padlock" Provisions of O.R.C. Sections 3767.04 and 3767.06 were Unconstitutional As Applied Herein.

The essence of the Court's erroneous ruling[12] was its conclusion that, even though a public nuisance had been

[12] The federal district court concluded (See Appendix at pages A11, A12) "that the provision of O.R.C. section 3767.06 authorizing a state court to order the closing of a premises upon which a nuisance has been found to exist violates the Fourteenth Amendment where, as in the present case, that sanction precludes the showing of films which have been found to be obscene in a prior adversary hearing and which thus might be protected by the First Amendment . . . " and that "the comparable provision in O.R.C. section 3767.04 authorizing a state court to close a premises pending a ruling on an application for a permanent injunction is similarly unconstitutional to the extent that it precludes the showing of films which have not been determined to be obscene in a prior adversary hearing."

found to exist at the Cinema I Theater based upon a course of conduct extending over a period of eight weeks and involving the exhibition of 16 obscene motion picture films, still the state court could not apply a statutory one year padlock penalty against the property because such penalty would also operate against the theater operator personally and, in thus preventing him from showing films at that location in the future which might be constitutionally protected, would constitute an unconstitutional prior restraint. By thus riveting its attention to the prior restraint "in personam" implications of *Near v. Minnesota*, 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625, the federal court below completely lost sight of the fact that the Ohio Legislature had undertaken in O.R.C. sections 3767 et seq. to provide what, unquestionably, is an "in rem" and not an "in personam" remedy. The "in personam" provisions which troubled the federal court are not an essential part of the statutory scheme and should have been disregarded by that Court under the paramount rule of statutory construction which requires a Court to ascertain and, where possible, to give effect to the intent and purpose of the legislature, as expressed in the statute. 82 C.J.S. Statutes, page 560.

Instead of according the state lawsuit its historical treatment as one which involved the *status* of real property and a determination of whether or not the "res" constituted a public nuisance from which certain statutory penalties flowed, namely the forfeiture of the leasehold interest in such property (a legal equivalent of "loss of use for a year") and the forfeiture of the personal property used therein - an approach which presented absolutely no constitutional questions, see *U.S. v. U.S. Coin and Currency*, 401 US 715, 28 L.Ed 2, 434, 91 S.Ct. 1041 (Apr 5, 1971), *One Lot of Emerald Cut Stones* and *One Ring v. U.S.* 409, U.S. 232, 34, LEd.2d 438,92, S.Ct. 489 (Dec. 11, 1972) - the court for some reason felt constrained to focus its attention on particular language of the statute which, when viewed by itself and apart from the general statutory scheme might, as an in personam restriction

against an individual, be questioned under the *Near v. Minnesota, supra*, prior restraint doctrine.

The construction given to the statute by the three-judge court below failed to take into consideration the fact that O.R.C. Section 3767, et seq., is a statute involving the public welfare. In the latter case, courts have always applied a liberal construction in favor of the public and a strict construction against those whose interests are adverse thereto. See 50 Ohio Jr.2d, Public Welfare, Section 24, at page 226:

> "Section 241. *Public Welfare* - It is a well established doctrine that every public statute has, or is supposed to have, as its objective some purpose or policy whereby the public welfare is served. The Legislature will be presumed to have enacted laws for the public good, and, therefore, where there is a strong interest relating to the public good or general welfare designed to be conserved by the statute, the courts, in interpreting it, apply a liberal construction in favor of the public and a strict construction against those whose interests are averse thereto. Indeed, it has been declared that in our form of government the only excuse for legislative enactment is that it will serve the public. Accordingly, in the interpretation of an ambiguous statute, a construction should be favored which is 'safe to the state' and the citizens thereof. Where a reasonable interpretation can be given to it which will make it operate for the welfare of the general public, as distinguished from the welfare of certain individuals, groups, or classes of individuals, the courts, in construing a statute, will not impute to the legislature the unworthy purpose of having intended to enact a law for the benefit of certain individuals, groups, or classes of individuals, as distinguished from the public. . . ."

In Ohio, where the statutory language defining "nuisance" specifically encompasses a place where obscene films are exhibited, the operation of the statute in general is quite simple. Its constitutionality as applied to one motion picture film ("I Am Curious (Yellow)") was challenged in the federal

system and upheld by a three-judge court in *Grove Press, Inc. v. Flask*, 326 F.Supp. 574 (March 10, 1970) (Celebrezze, Green, Batiste) see *Grove Press Inc. v. Flask* __U.S. __, 37 L.Ed2d 1013, __S.Ct. (June 25, 1973) vacated and remanded for further reconsideration in light of *Miller v. California* 413 U.S. 15, 37 L.Ed.2d. 419, 93 S.Ct. 207 (June 21, 1973). In *State of Ohio ex rel Ewing v. "Without A Stitch"* 37 Ohio St295, 307 NE2, 911 (Feb. 27, 1974) the Ohio Supreme Court also upheld its constitutionality. There the State Court discussed, at great length the operation of the Statute as a whole, as applied to the motion picture film, "Without A Stitch" and concluded at page 917:

> "It is interesting to note that six of those reasons were also raised and rejected by the federal district court in *Grove Press v. Flask*, supra, (326 F.Supp. 574).
>
> This court holds that R.C.3767.01 et. seq. prescribe a constitutionally permissible method of controlling the exhibition of obscene films."

While the *Flask* decision is now questioned by the three-judge court herein, where it attacks the operation of the statute (See appendix at page A-8),

> "Thus, upon a determination that as few as one or two films shown at a given theatre are obscene, the theatre can be ordered closed under this section for a period of one year regardless of the nature of any other films which the owner or operator may have intended to show during that period, with the burden on the owner to come into court and prove the non-obscenity of any such other film.....",

that objection is not well taken, in view of the subsequent interpretation given the statute by the Ohio Supreme Court in *State of Ohio ex rel Ewing v. "Without A Stitch"* 37 Ohio St. 2d.95 307 NE2, 911, 917 (Feb. 24, 1974) which holds that the release provisions do not require the owner to show that no film to be exhibited during the one-year period will be obscene.

After the decision went against Cinema I Theatre and William Dakota in the trial court and the preliminary injunction was issued, the losing litigants had an option as operators and "the person owning, in control, or in charge of the nuisance so enjoined". They could have shown "to the satisfaction of the court or judge that the nuisance complained of is abated," in which case, the court was not required to close the place against its use for the "lewdness" which had been found to exist. Under the Statute, the theatre cannot be shut down unless the trial judge is convinced from evidence that the public nuisance is *continuing* and presently exists. If for example, the public nuisance was found to exist solely on the basis of "I Am Curious (Yellow)" and such showing was not representative of the course of conduct normally experienced, then it could not reasonably be said that a public nuisance exists if, at the time of the trial judge's finding and the preliminary injunction, the film is not showing, having been "pulled" by a responsible exhibitor.

By admitting that under the above set of circumstances such a ruling is proper under the statute, it does not follow therefrom that such would be proper in all cases. The clear intent of the statute is otherwise. Where, for example, the proof were, as here, that the operator had exhibited hard-core programs over a long period of time, the trial judge would be warranted in refusing to accept the testimonial evidence offered by such operator as meeting his burden of proof, i.e., "to the satisfaction of the court that the nuisance had been abated." The trial judge could properly conclude that to accept such testimony would be to perpetuate a fraud on the court. See *People of the State of California ex rel Hicks v. Sarong Gals, supra*, (copy of opinion at Appendix D to this brief) where the Court in discussing a related problem noted that once the public nuisance had been established, the burden of *presenting evidence* that the public nuisance had been abated shifted to the defendant:

> "Appellants next contend that the order of abatement was invalid because the nuisance had been abated. In support of their contention, they argue that no evidence was

presented to establish violations of lewd conduct or obscenity statutes after December 15, 1970. The contention is without merit.

"In the first place, evidence was introduced at the trial reporting a performance at the Sarong Gals on or about January 3, 1973, less than two weeks before the trial date, from which the trial court could conclude that the nuisance was continuing.

"In the second place, once the People presented evidence to show that lewd acts had taken place at the Sarong Gals, it was incumbent upon appellants to present evidence showing that the nuisance had been abated. (See *People v. Goddard*, 47 Cal. App. 730, 734; *People v. Macy*, 43 Cal.App. 479, 483; *People v. Dillman*, 37 Cal. App. 415, 419-420.) It is a maxim of jurisprudence that "(a) thing continues to exist as long as is usual with things of that nature." (Civ. Code, §3547.) Appellants' reliance on *People v. Goddard*, supra, is misplaced. In *Goddard*, there was clear and uncontradicted evidence to show that the persons occupying the premises for immoral purposes vacated the premises three days before the filing of the complaint. No similar showing was made here.

1. **The Federal District Court's Analysis of the "Padlock" Provisions of the Ohio Public Nuisance Abatement Statute was Erroneous.**

Appellants herein submit that the error in the logic of the federal district court's opinion (Appendix at pages A3-12) is the result of faulty deductive reasoning, which proceeded somewhat as follows:

Major Premise: To enjoin the showing of films in the future without a prior adversary hearing on the obscenity of such films is a prior restraint and unconstitutional under *Near v. Minnesota, supra*, (Appendix at page A-11)

Minor Premise: The Ohio Public Nuisance statute, O.R.C. sections 3767.04 and 3767.06 operate to prevent the showing of films in the future without an adversary hearing on the obscenity of those films.(see Appendix at pages A-4, 10 and 11)

Conclusion: The Ohio Public Nuisance statute, O.R.C. sections 3767.04 and 3767.06 are unconstitutional.

The syllogism formed by the above three propositions is inaccurate for the facts in the minor premise have been used falsely, not having been given in their actual setting of experience, but abstractly from a larger whole of circumstances. See Legal Reasoning and Briefing, by Brumbaugh, copyright 1917 by the Bobbs-Merrill Co. at page 56:

"The situation is different if the answer or plea be one in confession and avoidance. Logically considered, *the admission or confession is not that the two premises are legally connected, but merely on the face logically correct. They are admitted to be, parts only, of a larger whole of circumstances which the complaint has not adequately set out,* and hence is an instance of where legal logic varies from ordinary logic. The latter concerns itself merely with the correct relationship of particulars and rules, but law looks into the actual background of fact. We have seen elsewhere that legal logic defines its own concepts, and prescribes the number, condition, and nature of its facts - now we perceive that it demands also that all of such facts be correctly reported. *Certain facts, therefore, in a pleading may be confessed as true, but at the same time not true for the purpose and effect for which they were originally drawn up, that is to say, their legal effect as the Minor Premise of a legal syllogism is false, because the facts have been used falsely, not having been given in their actual setting of experience, but abstracted from a larger whole of circumstances.* Thus, a part removed from the whole of which it is a part no longer appears in its true significance, and it is this falsity of a want of completeness against which an answer Confession and Avoidance is directed.

"*The effect of an answer in Confession and Avoidance, from the syllogistic side, is to eliminate the general rule of law as inapplicable to the actual and complete set of facts, and by means of the new matter which is added, completely change the coloring of the Minor Premise, so that*

it no longer expresses any cause of action against the defendant, or one of a different import and effect. In such manner the whole legal syllogism, as first set up by the complaint, vanishes. However, it does not follow that a trial will be made unnecessary, for the new matter alleged in the answer may in turn be denied, and this issue of fact will then be tried upon its merits. In such case the validity of the primary syllogism is held in obeyance until the latter question upon which it is now conditioned is determined. If the new matter is relevant and proved true, the whole original cause of action will disappear, or be modified, but if not, then the two premises alleged in the first pleading will become legally effective without further proof.

"In addition to pleadings by way of denial or confession and avoidance there may occur an answer calling for matter especially pleaded by way of estoppel, or otherwise, as for instance the Statute of Limitations, Statute of Frauds, Res Adjudicata, or defenses in suspension or abatement of the writ. What particular relation have these and other similar special pleadings to the syllogistic premises set out in the plaintiff's complaint or declaration? Unquestionably we have here another example of what was pointed out in the first chapter to be a variance of legal logic from ordinary logic. Somewhat in the nature of an avoidance without a confession, it does not deny the truth and validity of the rule of law to the case, nor does it question its applicability to the facts as alleged in the Minor Premise, but *it does a very unique thing - it invokes a wider rule of law within which the rule plead in the first pleading is but a part, just as in Confession and Avoidance, a wider sphere of fact was plead - and thus it challenges the right of the plaintiff to put the special set of facts in issue.* Hence, a greater rule of law is plead against a lesser, a more comprehensive syllogism over a lesser - the first plead by alleging the Minor Premise and implying the Major Premise, the second by pleading the Major Premise and implying the Minor Premise." (our emphasis)

On the above matter, consider the following second syllogism:

Major Premise: Under the ancient doctrine of deodand expressed in *U.S. v. U. S. Coin and Currency, supra,* and *One Lot of Emerald Cut Stones and One Ring v. U.S. supra,* where a place is determined in a legal proceedings to be operating as a public nuisance involving contraband, a penalty may be applied forfeiting the leasehold interest in the real property used in conducting such nuisance for a period of up to one year.

Minor Premise: The Ohio Public Nuisance Statute, O.R.C. sections 3767.04 and 3767.06 operate to prevent the showing of films in the future without an adversary hearing on the obscenity of those films thru forfeiture of the leasehold (use of the premises) as a penalty.

Conclusion: The Ohio Public Nuisance statute O.R.C. sections 3767.04 and 3767.06 are constitutional.

2. **The "Padlock" Provision of the Public Nuisance Abatement Statute Has Been Properly Interpreted In the Opinions of Two Recent Decisions.**

Appellants submit that the proper construction of the "padlock" provision of the Public Nuisance Abatement Statute is that which was recently expressed by a three-judge Federal Court for the Southern District of Ohio, Western Division, in *Cincinnati Properties, Inc. et al., v. Simon Leis et al.,* No. 8471, decided May 2, 1974, and by the Court of Appeals, Fourth Appellate District in *People of the State of California ex rel Hicks v. "Sarong Gals",* 4 Civ. 13235, decided Oct. 18, 1974. A copy of those decisions is attached to this brief at Appendix "B" and Appendix "D".

In the Cincinnati Properties, Inc. case, supra, the Court was faced with the identical issue which faced the Federal District Court herein, except that there the three-judge Federal District Court was considering an application of the padlock provisions of the Ohio Public Nuisance Statute, O.R.C. sections 3767.01 et seq., to an Adult Book Store.

"The plaintiffs' constitutional argument is this: A

person is operating a book store containing a thousand different items each concededly presumptively protected by the First Amendment - a fair sampling of the 1,000 produces 50 which are subsequently the subject of an adversary judicial proceeding and found to be obscene. Any state remedy applied to the facts which prevents the operator from staying in business at that location and selling the other non-judicially examined materials is a prior restraint on the sale of those materials and therefore violates the First Amendment. We do not agree. The argument overlooks the right of the State, within constitutional bounds, to declare or define public nuisances and abate them. A state may, of course, in the exercise of its police powers, prohibit certain conduct. It is not questioned - whatever the difficulties of ascertainment-that the states have power to prohibit obscenity and, within the *Miller* limits, to determine what is and is not. *Kingsley v. Brown*, 354 U.S. 436(1967); *United States v. Reidel*, 402 U.S. 351 (1971); *Miller v. California*, 413 U.S. 15 (1973); Paris v. Slaton, 413 U.S. 49 (1973). Nor is it questioned that a state, having judicially determined that a given product is obscene, may validly enjoin the sale of that product by an individual, provide for its destruction and/or provide a criminal sanction. The falacy of the plaintiffs' position is somewhat indicated by this simple example: A person possessing for sale one copy of one book concededly obscene and ten copies of a concededly non-obscene book is imprisoned for the former - during the term of imprisonment he is effectively stopped from dealing in non-obscene materials. Surely it would not follow that the imprisonment was unconstitutional because it was a prior restraint respecting the innocent materials.

"From time immemorial states have chosen, in the exercise of their police power, to define certain action as illegal and, in addition, to define the place where certain prohibited activity is carried on as a "nuisance." The attendant remedy provided in such nuisance cases has been one against the *place* in which the activity has been

carried on. This record is clear that the business of selling books and materials and offering shows was being carried on in the involved locations (see, for instance, the hundreds of publications contained in the "Inventory" involved in No. 8714 (copy of the state court record attached to defendant Conroy's motion for summary judgment). No one questions that the sampling was a fair one and that sampling produced what is 100%, on this record, illegal and unprotected obscenity.

"The State of Ohio has seen fit to define as a nuisance, subject to abatement, a place in which obscenity is conducted. There being no question of fact that a business of obscenity was carried on, the question in this case is, therefore, really whether the State may validly define the operation in the place as a nuisance and close it for a year - padlock it - on that basis. If it can, there is no prior restraint of the non-judicially-viewed material, except purely incidental. As Mr. Justice Frankfurter said in *Kingsley*, at p. 441, "the phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.'"

"The constitutional power of the State to abate what has been appropriately defined as a public "nuisance" has never been seriously questioned. "Padlock" remedies have been consistently provided for by most states in the areas of prostitution, gambling, and liquor violations. It is not for us to conclude that one or the other of these subjects vis-a-vis the State's padlock power should be classed differently than obscenity. Each is a proper object of the police power and not unrelated. To quote again from *Kingsley*, at page 441, the Supreme Court, speaking in the

area of dissemination of pornography, said:

> "It is not for this Court thus to limit the State in resorting to *various weapons in the armory of the law.* (Underscoring ours.) Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice."

"*Mugler v. Kansas*, 123 U.S. 623 (1887) involved Kansas' first prohibition laws and, among others, a section providing, "All places where intoxicating liquors are. . . . sold. . . . are declared to be common nuisances and upon the judgment of any court. . . . finding such place to be a nuisance under this section, the sheriff. . . . shall be directed to shut up and abate such place. . . ." The place involved had been the subject of liquor sales. The Court, in upholding the constitutionality, said:

> "The State, having authority to prohibit the. . . . sale of intoxicating liquors. . . . we do not doubt her power to declare any place kept and maintained for the illegal manufacture and sale of such, shall be deemed a common nuisance and to be abated, and, at the same time, to provide for the indictment and trial of the offender. *One is a proceeding against the property used for forbidden purposes* . . . .The statute does not put the brand of a common nuisance upon any *place*, unless. . . . *that place* is kept and maintained for purposes declared by the legislature to be injurious to the community." (Underscoring ours.)

"The padlocking provision of the Ohio statute is a time honored remedy involving the place - it is not censorship or prior restraint."

In *People of the State of California ex rel Hicks v. "Sarong Gals"*, supra, the Court of Appeal was construing an application of the California Red Light Abatement Stature, a related statute (See "Historical Background", infra, at page 82) which permanently enjoined certain parties from "maintaining, using or occupying the premises known as "Sarong Gals" for the purpose of lewdness and which closed the prem-

ises to all users for one year. . . " In affirming the permanent injunction, the Court of Appeal analyzed the "padlock" provision as follows:

"Appellants finally contend that the abatement order is overbroad and impinges upon their First Amendment right to present non-lewd dancing exhibitions at the Sarong Gals. Of course, just as a court order for the incarceration of a convicted lawbreaker impinges on all sorts of constitutional rights, so does the abatement order. The order shutting down the property except for limited uses is specifically authorized, however, by Penal Code, section 11230 which permits the 'closing of the (offending) building . . . against its use for any purpose . . . for a period of one year, . . . 'The question is, therefore, not whether the order impinges on constitutionally guaranteed rights, but whether the statute constitutes a permissible exercise of the state's police power. (Cf. *Consolidated Rock Products Co. v. City of Los Angeles*, 57 Cal.2d 515, 530.)"

"The purpose of Red Light Abatement proceedings is to abate a nuisance. Abatement of nuisances is a long established and well recognized exercise of the state's police power. (*Board of Supervisors v. Simpson*, 36 Cal.2d 671, 675; *People v. Casa Co.*, 35 Cal.App. 194; *People v. Barbiere*, 33 Cal.App. 770, 775-776.) The provision in Penal Code, section 11230 authorizing closing of the offending property to all uses for a period of one year, while harsh, is constitutionally permissible. The Legislature could, and presumably did, consider the alternative of constant police surveillance of the offending premises too burdensome to the community. It is to be remembered that Red Light Abatement proceedings are directed against the offending property itself. Their purpose, it has been said, "is to effect a reformation in the property itself." (*People v. Bayside Land Co., supra*, 48 Cal.App. at p. 261.) Thus, while appellants are arguably denied their right of First Amendment expression to some extent, they are denied such right only upon the specific property here involved and only for a limited period of time. They are in the meantime free to exercise their First Amendment

rights at any other place. Moreover, appellants' restricted First Amendment rights are penumbral at best. The right to present non-lewd dancing for commercial purposes in a beer bar is hardly to be equated with the right to hold a town hall meeting. (See *Crownover v. Musick, supra*, 9 Cal. 3d at pp. 424-426.) Thus, the interference with appellants' right to free expression is limited and easily overbalanced by the state's substantial interest in abating public nuisances."

"The judgment is affirmed."

B. Ohio Revised Code sections 3767.04 and 3767.06 are Constitutional on their face.

(B) HISTORICAL BACKGROUND

Consider the following hypothetical situation: Suppose that, over a period of several months, Jurisdiction "A" filed a succession of seven different criminal complaints against an activity, alleging that on each of those seven occasions two obscene motion picture films were exhibited, and that the obscenity laws had been violated by such conduct at that address. Suppose further, that, after each criminal charge a criminal trial had taken place and the defendant had been found guilty as charged. Can there be any doubt that, under general principles of law and without benefit of statute, a district attorney in that jurisdiction could successfully state a civil cause of action, alleging that the repeated and continuing illegal conduct at that address constituted a public nuisance which should be abated? Is there any doubt that an equity court could make a finding that such repeated illegal conduct at that address constituted a public nuisance and, upon a further finding that such condition *was continuing and presently existed*, could authorize that the same be closed as a public nuisance? Further, is there any doubt that, having found the public nuisance to be *presently in being*, the equity court could lay down the conditions upon which the activity might remain in operation, one of which could be that the errant party show to the satisfaction of the court that the public nuisance no longer existed? See

Crain v. State, 3 Ind. 193 (1851); Perkins on Criminal Law, Foundation Press, 1954; *Bloss v. Paris Township*, 157 N.W. 2d 260 (Apr. 1, 1968); Joyce, Law of Nuisances, Sect. 7, page 15; *Cactus Corporation d.b.a. The Apache Drive-in Theatre v. State of Arizona ex rel Murphy, City Attorney of Tuscon*, 480 P.2d 375 (Feb. 9, 1971); *Evans Theatre Corp. et al v. Slaton*, 227 Ga. 377, 180 S.E.2d 712 (Mar. 4, 1971), cert. den. Nov. 7, 1971, in 404 U.S. 950, 30 L.Ed.2d 267, 92 S.Ct. 281; *Weis v. Superior Court of San Diego County*, 30 Cal. App. 730, cited with approval in *California v. Lim*, 18 Cal.2d 872. *Maita v. Whitmore* 365 F. Supp. 1331 (Nov. 9, 1973); *Richards v. Texas* 497 SW2 770 at 780 (July 2, 1973).

Add an additional factor for a new hypothetical. Suppose that in the above Jurisdiction "A", the legal process for getting criminal matters to trial and for getting such criminal trials finalized has been rendered inoperative for any of a number of reasons; may Jurisdiction "A" make an end around run on the criminal trial pitfall and select, in the first instance, as the primary law enforcement tool: (1) the civil action to abate a public nuisance, alleging and proving in that single trial a course of continuing conduct by establishing as evidence the acts which comprise the seven alleged criminal violations, (2) asking that the law of forfeitures in connection with public nuisance be applied and (3) assessing costs of abatement, including Attorney's Fees, where the conduct involved can be said to be malicious?

To ask the above rhetorical questions is to supply the obvious answers. The power of the state court in such matters is clear. In *Kingsley Book, Inc. v. Brown*, 354 U.S. 436, Justice Frankfurter, writing for the majority court, supplied the following answer at page 441:

> "We need not linger over the suggestion that something can be drawn out of the due process clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this court thus to limit the state in resorting to various

> weapons in the armory of the law. *Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action*, or by an injunction or by some or all of these remedies in combination *is a matter within the legislature's range of choice (citation).* If New York chooses to subject persons who disseminate obscene 'literature' to criminal prosecution *and also to treat with such books as deodands of old, or both*, with due regard of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies. . . ." (our emphasis.)

The terms "qui tam action" and "deodand",[13] referred to by Justice Frankfurter, are defined in Black's Law Dictionary, Revised, 4th Editon, as:

> "QUI TAM. Lat. 'Who as well . .' An action brought by an informer under a statute *which establishes a penalty for the commission or omission of a certain act*, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution, is called a 'qui tam action'; because the plaintiff states that he sues as well for the state as for himself. See In Re Barker, 56 Vt. 14; Grover v. Morris, 73 N.Y. 478." (our emphasis.)

> "DEODAND (L.Lat. DEO dandum, a thing to be given to God) in English law. *Any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the Crown* to be applied to pious uses, and distributed in alms by the High Almoner. 1 Hale, P.C. 419; Fleta, Lib 1, C25; 1 Bl. Comm. 300; 2 Steth. Comm. 365. See Parker-Harris Co. v. Tate, 135 Tenn. 509, 188 S.W. 54, LRA 1916F, 935.." (our Emphasis)

When the authors of the Ohio Public Nuisance Statute first

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[13] See Callero-Toledo v. Pearson Yacht Leasing Co. ___U.S. ___ decided Mary 15, 1974.

sat down, over 50 years ago, to draft new legislation on this ancient problem, they were thinking of the laws of forfeiture and deodand when they pondered new solutions in this area of public nuisance, to compensate for certain inadequacies of the criminal law.

Ohio Revised Code, Section 3767 et seq. providing for abatement of public nuisances and certain forfeitures in connection therewith, had its derivation at a time in our history when lewdness of a different type was plaguing the Nation. The procedural problems however, were quite similar. See 20 Columbia Law Review, at 604, which traces the history of such litigation:

> " 'RED LIGHT' INJUNCTION AND ABATEMENT ACTS' – *The strong arm of equity has lately found increasing employment through the enactment in thirty-eight states of 'Red Light' laws for the abatement of disorderly houses.* Modelled upon the liquor laws which originated in Iowa, these laws owe their enactment *to the inadequacy of criminal prosecutions;* and accordingly permit any citizen of the county wherein the nuisance exists to bring his civil action to enjoin and abate it. The effectiveness of the legislation lies in stringent provisions for abatement and in penalities for contempt.
>
> "This is clearly police legislation, designed to protect the public health and morals rather than to provide a remedy for injury to private property. For instance, the injunction is made binding upon the defendants throughout the jurisdiction of the court and frequently throughout the entire state. Not only are the costs of the action made a lien upon the premises; but in many states a 'tax' or fine is levied when the final injunction is issued. . ." (our emphasis.)

The historical development of this type of statute has been in three directions: (1) Some states, like Missouri, use language which is clearly limited to houses of prostitution (M.R.S. Section 563.120); (2) other states, like California, have used statutory language like "Prostitution, assignation and lewdness" in which, by judicial decision, the term "lewdness"

has been given a broad meaning. See *People v. Bayside Land Co.*, 48 Cal App. 257, 191 P. 944, where the word "lewdness" in Penal Code Sect. 11225, was given broad significance so as to include all other immoral or degenerate conduct or conversation between persons of opposite sexes and was held not limited to "assignation" and "prostitution." See also *People ex rel. Hicks v. "Sarong Gals"* (Oct. 18, 1974) (copy at Appendix "D" to this Brief), *People ex rel. Hicks v. "Sarong Gals"* 103 Cal.Rptr. 414 (Aug. 3, 1972) and the dissent of Justice Herndon in *Harmer v. Tonylyn Productions Inc.* 100 Cal.Rptr 576, 577-583 (Mar. 2, 1972). (3) other states, like Ohio and Louisiana have adopted amendments which specifically include places where obscenity is exhibited (O.R.C. section 3767.01).

2. Ohio Revised Code Section 3767.04

The action is commenced by the filing of a verified petition. R.C. Section 3767.04. Where the filing is by a citizen, a bond in the sum of not less than $500.00 is required to secure the payment of damages if such action is wrongfully brought. R.C. Section 3767.03. Upon the filing of the complaint, several discretions or options are given to the person upon whose relation the state action was brought, and to the trial judge, which if exercised, may result in other options (and also mandates). The person *may* or *may not* apply for a temporary injunction. If he does, the judge *must* grant a hearing within 10 days after the filing of the petition. Where the complaining party, *in his discretion, decides* to apply for a preliminary injunction, *he may also, in his own discretion,* apply for an ex parte restraining order to prevent the personal property and contents of the place from being removed until the court's ruling on the preliminary injunction. Where such application is made, the judge has a discretion and *may* or *may not* grant such restraining order. See R.C. Section 3767.04, which provides, in part, as follows: (see Appendix at page B-4)

> "After the filing of the petition, application for a temporary injunction may be made to the court or a

> judge thereof who shall grant a hearing within 10 days after the filing. Where such application for a temporary injunction is made, the court or judge thereof, may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon. . . ."

The use of the term 'may' and 'shall' in the above context is quite clear. In the interpretation or construction of statutes, the primary and paramount rule is to ascertain, declare, and give effect to the intention of the Legislature if it is possible to do so. 50 Ohio Jur. 2d, Statutes, at page 139.

The ex parte restraining order authorized by Section 3767.04, *if applied for* at the time of filing the application for a preliminary injunction, and *if issued* by the trial court, does not amount to a prior restraint of free speech. See *Grove Press, Inc. v. Flask*, 326 F. Supp. 574, 579 (Mar. 10, 1970); *U.S. v. Little Beaver Theatre, Inc.*, 324 F. Supp. 120, 121 (Jan. 15, 1971); *Go v. Peterson*, 480 P.2d 35, 36 (Feb. 1, 1971), *Walter v. Slaton*, 182 S.E.2d 464, 467 (May 13, 1971). Nor was it established for anything related to that purpose. The Legislature, in specifically authorizing the court to bring such contents within the court's jurisdiction, did so for the purpose of assuring that the special provisions established by the Legislature might be given effect, i.e., so that the forfeiture established by Section 3767.01(C) (which declared all such personal property and contents to be a nuisance) might be effective in carrying out the summary remedy afforded by Section 3767.06 (which provides for the sale of such personal property) and Section 3767.11 (which provides that the "proceeds of the sale of the personal property. . .shall be applied in payment of the costs of the action and abatement including the complainant's costs . . . .")

The third paragraph of Section 3767.04 sets forth in clear language what must follow where the complaining party establishes the right of the state to relief at the hearing on the preliminary injunction. That paragraph provides that the injunction *shall issue without additional bond* (a grant of authority which is uncommon in temporary injunction causes. See 29 O. Jur.2d, Injunctions §126 Bond or Other Security, at page 419). That paragraph provides, in part:

> "If upon hearing the allegations of the petition are sustained to the satisfaction of the court or judge, the court or judge *shall issue a temporary injunction without additional bond* restraining the defendant and any other person from continuing the nuisance. . . ." (Our emphasis.)

The temporary injunction, authorized by O.R.C. Sect. 3767.04, operates in a dual capacity: both against the person of the defendants who are before the court, and against the property (the res), which is also before the court: (by posting a copy of the order on the premises). The "in personam" aspect is not an essential part of what is clearly an "in rem" statutory scheme, and should have been disregarded by the federal district court under the paramount rule of statutory construction which requires a court to give effect to the intent and purpose of the legislature.

In the next sentence of the same section, the Legislature accorded summary relief to the state against the real estate. Where the complainant at such hearing on the preliminary injunction establishes the fact of a public nuisance and the right of the state to a preliminary injunction, the court *is mandated thereby* to issue an *order closing the place against its use for* any purpose of lewdness until final decision is rendered on the application for a permanent injunction *unless "the person owning, in control or in charge of the nuisance so enjoined shows to the satisfaction of the court or judge that the nuisance complained of is abated."* The language of the statute is:

> "If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had re-

ceived five days' notice of the hearing and *unless such person shows to the satisfaction of the court or judge that the nuisance complained of is abated*, or that such person proceeded forthwith to enforce his rights under Section 3767.10 of the Revised Code, the court or judge *shall forthwith issue an order closing the place against its use for any* purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction. . . ." (our emphasis)

In *State of Ohio ex rel Ewing v. "Without A Stitch"*, supra the Ohio Supreme Court held the use of the word "shall" in R. C. sections 3767.05, 3767.06 and 3767.08 to impose a a manditory duty, at page 917:

"Appellants contend that a trial court is not required to invoke every possible remedy provided in R.C. 3767.01 et seq. after finding a film to be obscene, and therefore the Court of Appeals erred in holding the remedies mandatory. However, an examination of the statutory language used in R.C. 3767.01 et seq. will show that the Court of Appeals was correct."

"Upon a finding that a theater is exhibiting an obscene film R.C. 3767.05, 3767.06 and 3767.08 dictate the relief to be granted. Each statute uses the world "shall" to describe the duty of the trial judge to impose the various remedies stated therein, and this court has held that the use of the word "shall" in a statute must be construed as imposing a mandatory duty unless there appears a clear and unequivocal legislative intent that it receive a meaning other than its ordinary meaning. *Dorrian v. Scioto Conserv. Dist.* (1971), 27 Ohio St.2d 102, 271 N.E.2d 834. *Since no such legislative intent appears in R.C. 3767.01 et seq., the remedies imposed are mandatory.*" (our emphasis).

Under the above closure provision, *the leasehold interest* where such public nuisance is conducted or maintained and *the personal property* and contents located and used *therein*

are to be forfeited until final decision is rendered on the application for a permanent injunction *unless either of two conditions is shown to exist, namely:* (1) That the person "owning, in control, or in charge of the nuisance so enjoined. . ." *affirmatively* "shows to the satisfaction of the court. . . that the nuisance complained of is abated," or (2) That the lessor of such a place, being used by the tenant for the purpose of lewdness, affirmatively shows to the satisfaction of the court that he proceeded forthwith to void the tenant's lease as authorized by O.R.C. section 3767.10 and has regained possession of the premises.

O.R.C. section 3767.04 further allows the owner of any real property so restricted to appear at any time between the filing of the petition to abate the nuisance and the hearing on the application for a permanent injunction and regain possession of such real property by fulfilling three requirements; namely (1) Payment of all costs incurred; (2) Filing a bond as owner of such real property conditioned that he will immediately abate the nuisance and prevent the same from being maintained until decision by the court on the application for a permanent injunction and (3) Satisfying the court of his good faith. The statute also allows the owner of any personal property so restricted to appear at any time between the filing of the petition to abate the nuisance and the hearing on the application for a permanent injunction therein and to regain possession of such personal property by fulfilling two requirements, namely (1) Payment of all costs incurred, and (2) Satisfying the court of his innocence of any knowledge of the use of such personal property as a nuisance and that with reasonable care he could not have known thereof.

At the time of the trial judge's ruling in the Common Pleas court below, on Oct. 24, 1972, granting the temporary injunction it was clear, beyond doubt, that absolute judicial restriction at this point of the proceeding - after trial on the merits - was entirely proper. The right of a state court system to impose a judicial restraint by way of preliminary injunction after a hearing on the merits, is no longer a debatable issue. The constitutional requirement for a "prompt final judicial

decision" referred to by this court in administrative prior restraint cases such as, *Marcus v. Search Warrants*, 367 U.S. 717, 6 L.Ed.2d 1127, 81 S.Ct. 1708 (June 19, 1961); *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L.Ed2d 809 (June 22, 1964); *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (Mar. 1, 1965), and *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 19 L.Ed.2d 966, 88 S. Ct. 754 (Jan. 29, 1968), had reference to a speedy determination *by a trial court* as distinguished from a prior restraint applied in administrative proceedings. If the language and reference of this court in *Teitel Film* at page 969 to "prompt final judicial decision by the trial court":

> "... The Chicago censorship procedures violate these standards in two respects. . . (2) the absence of any provision for a *prompt judicial decision by the trial court* violates the standard that. . .the procedure must also assure a prompt final judicial decision . . . ." (our emphasis.)

was not clear, that issue was laid to rest in *Interstate Circuit Inc. v. Dallas* 390 U.S. 676, 20 L.Ed 2d225, at 235, fn22, 88 S.Ct. 1298 decided on Apr. 22, 1968 of the same term of court.

> "22. Appellants also assert that the city ordinance violates the teachings of *Freedman v. Maryland, supra, because it does not secure prompt state appellate reveiw. The assurance of a 'prompt final judicial decision'* (380 U.S. at 59, 13 L.Ed.2d at 655) *is made here, we think, by the guarantee of a speedy determination in the trial court* (in this case nine days after the Board's classification). *see Teitel Film Corp. v. Cusack*, 390 U.S. 139, 19 L.Ed. 2d 966, 88 S.Ct. 754. . . ." (our Emphasis.)

The *Interstate Circuit* decision gives a crystal clear understanding of what this court meant in *Freedman* by "prompt, final judicial decision." The court is *not* making an issue out of the time period which is expended in carrying out the appellate review. That was one of the issues in the *Interstate Circuit* case. See the Jurisdictional Question and Arguments

of Appellant Interstate Circuit in their brief on the merits at pages 3, 20 and 21. See also *U.S. v. 37 Photographs*, 402 U.S. 363, 91 S. Ct. 1400, 28 L.Ed.2d 822, at pages 830-833 (May 3, 1971), which authorizes actual prior restraints by way of court order for a reasonable period of time in advance of a final determination of the obscenity issue by the *trial court* in Federal Customs cases.

That the judicial restraint may be applied after an adversary hearing at the *preliminary injunction* stage does not raise any additional procedural issues for, as authorized by Civil Rule 65(B)(2), the Ohio Trial Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

3. Ohio Revised Code Section 3767.06

Under O.R.C. Section 3767.06, the Common Pleas Trial Court's final judgment of Nov. 30, 1972 does not foreclose the errant litigants from acquiring the right of reentry and repossession. The court order read "is ordered closed for any purpose for a period of one year unless sooner released by Order of this Court pursuant to defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio." (Appendix, page I-6). The trial court was following Section 3767.06 which provides the following mode of relief:

> "3767.06. Content of judgment and order. If the existence of a nuisance is admitted or established in an action as provided in Sections 3767.01 to 3767.11, inclusive, of the Revised Code. . . an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in Section 3767.04 of the Revised Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Such

> order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in Section 3767.04 of the Revised Code, or, if not so furnished shall continue for one year any closing order at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one year *unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in Section 3767.04 of the Revised Code."* (our emphasis.)

Section 3767.06 operates to allow the owner of any real property so restricted to reenter and regain possession of such real property after such order of abatement by fulfilling three requirements, namely (1) Payment of all costs incurred; (2) Filing a bond as owner of such real property conditioned that such person will immediately abate the nuisance and prevent the same from being so kept for one year from the final order of abatement, and (3) Satisfying the court of his good faith. It also allows the owner of any personal property so restricted to regain possession of the same, if claimed within 10 days after such final order of abatement, by fulfilling two requirements, namely, (1) Payment of all costs incurred, and (2) Proving, to the satisfaction of the court, innocence of any knowledge of said use thereof, and that with reasonable care and diligence he could not have known thereof.

In commenting on the ameliorating provisions of the statute as they apply in a case where the trial had progressed to the permanent injunction stage, the Ohio Supreme Court in *Ohio ex rel Ewing v. "Without A Stitch", supra*, held as follows at page 917:

> "The third mandatory remedy is found in R.C. 3767.06. It requires the removal and sale of all personal property used in conducting the nuisance. However, the

owner of such personal property is permitted to escape the sale order by coming into court within ten days after the abatement order is filed and showing that he had neither actual nor constructive knowledge that his property was being used to maintain a nuisance.

"The fourth remedy is also contained in R.C. 3767.06. One part of the statute dictates that the abatement order include an order closing the place, in and upon which the nuisance was maintained, for a period of one year. R.C. 3767.06 states that the closing pertains to the use of the property "for any purpose." However, this harsh penalty is ameliorated by permitting the owner to obtain a release from the order by complying with the release provisions of R.C. 3767.04. Those provisions require that the closing order must be released if the owner appears in court, pays the costs incurred in the action, files a bond in the full value of the property, and demonstrates to the court that he will prevent the nuisance from being reestablished. The nuisance is the exhibition of the particular film declared obscene. The release provisions do not, as appellants contend, require the owner to show that no film to be exhibited during the one-year period will be obscene. Such a requirement would not only be impossible, as a practical matter, but also would be an unconstitutional prior restraint on an activity generally protected by the First Amendment. *Freedman v. Maryland, supra* (380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649); *Speiser v. Randall, supra* (357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed2d 1460). The language of R.C. 3767.06 does not require a construction which would render the one-year closing provision unconstitutional, and this court will not so construe it."

CONCLUSION

Wherefore, appellants pray:

(1) That the order of judgment entered on April 20, 1973 in *Pursue Ltd. v. Lawrence S. Huffman* CIV No. 72-432 be reversed and that said action be dismissed for failure to state a claim upon which federal relief can be based.

(2) That *State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota et. al.* 72 CIV 0326 be ordered remanded back to the Court of Common Pleas of Alien County, Ohio to permit appellants to execute the final judgment of said court, entered on Nov. 30, 1972.

November 8, 1974

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November 1974, copies of the Brief for Appellants were airmailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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APPENDIX A

Memorandum Decision

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CINCINNATI PROPERTIES, INC. d/b/a/ Monte Vista Theater, Plaintiff, v. SIMON LEIS, et al., Defendants.	) (( ) ( ) (	Civil Action No. 8471
STANLEY MARKS, Plaintiff, v. SIMON LEIS, et al., Defendants.	) ( ) ( )	Civil Action No. 8714
TERRY L. BARNETT, et al., Plaintiffs, v. SIMON L. LEIS, JR., et al., Defendants.	( ) ( ) (	C I 74-112
MONTY EMERY, Plaintiff, v. SIMON L. LEIS, JR., et al., Defendants.	) ( ) ( )	C I 74-128

Before Peck, Circuit Judge, and Porter and Hogan, District Judges.

PER CURIAM.

These cases, with the consent of all the parties, have been consolidated. In each of them the question of the constitutionality (or the constitutionality as applied) of the Ohio "Nuisance" laws (O.R.C. 3767.01, et seq.) is involved, generally. Cross motions for summary judgment were filed in 8714 addressed to a common question (which motions have been briefed and argued and are herein considered).

In each of the cases this Court is asked to enjoin the abatement provisions of the Ohio statutes in the area of obscenity as violative of the First Amendment. Three of the consolidated cases involve Adult Bookstores (offering books, pamphlets and, in addition, so-called Peep Movies). One (8471) involves a movie house.

Civil Action 8714 was preceded by an action instituted under the Ohio statutes in the Hamilton County Common Pleas Court against the operator of three book stores and the owners of the real estate involved. A restraining order issued in the State Court action against the removal of any property from the locations pending the taking of an inventory. The inventory was promptly taken. Thereafter the restraining order was dissolved and operations were renewed. Civil No. 8714 was filed in this Court at that stage (to enjoin further proceedings in the state case) and the state case is in status quo by agreement of the parties pending decision by this Court on the pending motions. Prior to the filing of the action in the Common Pleas Court, the plaintiff had "sampled" the offerings of the stores and evidence of some 51 samplings (books, magazines, pictures (stationary and movie)) were filed with the state complaint. By stipulation of the parties to 8714, it is agreed that the samplings are each de facto and de jure obscene, under any test - whether *Miller* (*Miller v. California*, 413 U.S. 15 (1973)) or pre-*Miller*.

In 74-128 (Emery) the proceedings have progressed further. One Adult Bookstore is involved, called "Sin City." It has been in operation for several months during which time various law enforcement officers have entered and sampled

the offerings (magazines and films). These films and magazines (11 in number) are specifically named in the complaint filed in the Common Pleas Court and the same stipulation as to obscenity applies to that case. An inventory was taken and the case was tried on the merits in the Common Pleas Court. It is important to note that prior to the merit hearing in that court there was no significant interference with the Bookstore's business, i.e., there was no significant restraint *prior* to a fully noticed and adversary judicial hearing. There is no doubt that the "samples" were representative - at least the parties are in agreement that hundreds of other books and pamphlets and significantly additional movies (in addition to the 11 specific) were in the inventory of the operator. The State Court, as a result of that hearing, concluded that a "nuisance" existed at the location, ordered its "abatement," ordered the place involved "padlocked" for a year, but extended to the owner the statutory opportunity of retaking possession upon giving bond.

In 8471 a movie house is involved. The two movies exhibited at one performance furnished the basis for the abatement action in the State Court. On a finding of obscenity with respect to these movies, a nuisance judgment issued including an abatement and one year "padlock" order. This Court temporarily enjoined the closing. Temporary injunctions have been denied in the bookstore cases.

A brief description of the Ohio Nuisance statutes (O.R.C. 3761.1, et seq.) is appropriate. A "nuisance" includes "any place . . . . in which or upon which lewdness. . . . is conducted or upon which lewd or obscene films . . . . are shown" and includes the personal property used in connection with conducting the nuisance. Either a private person or the prosecuting attorney may bring an action to abate the nuisance and enjoin its maintenance. Upon the filing of a complaint the State Court may issue a restraining order preventing removal of any property from the place and the Sheriff is required, if such order issues, to forthwith inventory the personal property in the location. A hearing for temporary injunction purposes is provided for, which may be combined with a merit hearing. This much appears clear - except for the restraint for inventory

purposes, there is no seizure nor any interference, nor any suppression of any speech or ideas until a judicial hearing. The hearing provided for is a prompt one (within 10 days and on 5 days' notice).

The section of the Ohio law which is most directly involved in these cross motions is that dealing with the decree upon a merit hearing by the State Court. The statute provides that if the existence of the nuisance be established the final decree "shall include an order directing the effective closing of the place against its use for any purpose[1] and keeping it closed for a period of one year unless sooner released . . . . the owner may then appear and obtain a release under a bond "conditioned upon the abatement of the nuisance and preventing the same from being established." As recently construed by the Ohio Supreme Court, as applied to movies, these conditions do not "require the owner to show that no film to be exhibited during the one-year period will be obscene . . . . such a requirement would be an unconstitutional prior restraint." *State, ex rel v. Film*, 37 Ohio St.2d, at 105 (1974).

The parties are all in agreement that the narrow question before us is whether or not the abatement and closing (for a year) provisions of the Ohio statute are constitutional.

The plaintiffs' claim for relief is based on four grounds. The first is that the Ohio courts are applying or will "overbroadly" apply the nuisance section in that the Chapter, as such, applies only to motion picture films. However (a) the operator is, in each instance, or was, at the time pertinent, exhibiting a film, and (b) at least where the construction is arguable, it is one for the Ohio Courts and the Ohio Courts have construed the section as applicable to books and pamphlets, as well as to films.

The second ground is stated in terms of retroactivity and in short is this: That the decision in *Miller*, 413 U.S. 15 (1973), changing the standard set forth in *Memoirs*, 383 U.S. 413 (1966), effectively "scrapped" all previously passed state

[1] As applied to a book store - since such an order prevents the sale of books, for instance, in addition to those sampled and the subject of specific obscenity findings by the State Court, this provision is claimed to be an illegal "prior restraint."

obscenity statutes (and with them nuisance statutes based thereon). Or, to put it another way, the plaintiffs claim (a) that the Ohio statutes in question, by judicial interpretation, incorporated the definitions set forth in *Memoirs* (and see *State v. Mazes*, 7 Ohio St.2d 136 (1966)); (b) since *Miller* changed the constitutional test, the Ohio statutes are necessarily vague and overbroad (at least until redefined by the courts or the legislature). The answer to that is that the Supreme Court indicated to the contrary when, in 1973 and after *Miller*, THE COURT remanded a number of cases then pending before it to trial courts to give those courts the opportunity to determine the obscenity questions involved consistent with the opinion in *Miller*. (Cf. *State, ex rel v. Vixen*, 35 Ohio St.2d 215 (1973).

The third ground is that the statutes, as written, necessarily are unconstitutional as a prior restraint on presumptively protected First Amendment material and the fourth is that if there be any doubt of that, the doubt is removed by the application of the statutes by the Ohio courts. In that connection this consolidated proceeding does indicate on its face that there have been at least two applications of the statutes by the local state courts. In the one (8471 - Monte Vista) a movie house was closed or padlocked for a year and the owner refused access to the premises for any purpose and under any conditions. This Court enjoined the enforcement of that order. In the other (C 1 74-128 - Emery) a book store has been ordered padlocked (closed) for a period of one year. The order afforded to the owner the bond opportunity. The conditions of the bond, as stated in the order, complied with the statutory construction adopted by the Ohio Supreme Court in *State, ex rel v. A Film*, 37 Ohio St.2d, at 105. Specifically, the conditions would be broken only by the commission of a future nuisance consisting of the sale or exhibition of some or all of the materials as had *theretofore and in the abatement proceeding* been judicially determined by the State Court to be obscene. The facts in 74-128 furnish a fair foundation for the plaintiffs' applied argument. (The State Order involved in 8471 does not - it went contra to the statute and contra to the construction subsequently placed upon the

statute by the Ohio Supreme Court.

The plaintiffs' constitutional argument is this: A person is operating a book store containing a thousand different items each concededly presumptively protected by the First Amendment - a fair sampling of the 1,000 produces 50 which are subsequently the subject of an adversary judicial proceeding and found to be obscene. Any state remedy applied to the facts which prevents the operator from staying in business at that location and selling the other non-judicially examined materials is a prior restraint on the sale of those materials and therefore violates the First Amendment. We do not agree. The argument overlooks the right of the State, within constitutional bounds, to declare or define public nuisances and abate them. A state may, of course, in the exercise of its police powers, prohibit certain conduct. It is not questioned - whatever the difficulties of ascertainment - that the states have power to prohibit obscenity and, within the *Miller* limits, to determine what is and is not. *Kingsley v. Brown*, 354 U.S. 436 (1967); *United States v. Reidel*, 402 U.S. 351 (1971); *Miller v. California*, 413 U.S. 15 (1973); *Paris v. Slaton*, 413 U.S. 49 (1973). Nor is it questioned that a state, having judicially determined that a given product is obscene, may validly enjoin the sale of that product by an individual, provide for its destruction and/or provide a criminal sanction. The falacy of the plaintiffs' position is somewhat indicated by this simple example: A person possessing for sale one copy of one book concededly obscene and ten copies of a concededly non-obscene book is imprisoned for the former - during the term of imprisonment he is effectively stopped from dealing in non-obscene materials. Surely it would not follow that the imprisonment was unconstitutional because it was a prior restraint respecting the innocent materials.

From time immemorial states have chosen, in the exercise of their police power, to define certain action as illegal and, in addition, to define the place where certain prohibited activity is carried on as a "nuisance." The attendant remedy provided in such nuisance cases has been one against the *place* in which the activity has been carried on. This record is clear that the business of selling books and materials and offering shows was being carried on in the involved locations (see, for

instance, the hundreds of publications contained in the "Inventory" involved in No. 8714 (copy of the state court record attached to defendant Conroy's motion for summary judgment). No one questions that the sampling was a fair one and that sampling produced what is 100%, on this record, illegal and unprotected obscenity.

The State of Ohio has seen fit to define as a nuisance, subject to abatement, a place in which obscenity is conducted. There being no question of fact that a business of obscenity was carried on, the question in this case is, therefore, really whether the State may validly define the operation in the place as a nuisance and close it for a year - padlock it - on that basis. If it can, there is no prior restraint of the non-judicially-viewed material, except purely incidental. As Mr. Justice Frankfurter said in *Kingsley*, at p. 441, "the phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.'"

The constitutional power of the State to abate what has been appropriately defined as a public "nuisance" has never been seriously questioned. "Padlock" remedies have been consistently provided for by most states in the areas of prostitution, gambling, and liquor violations. It is not for us to conclude that one or the other of these subjects vis-a-vis the State's padlock power should be classed differently than obscenity. Each is a proper object of the police power and not unrelated. To quote again from *Kingsley*, at page 441, the Supreme Court, speaking in the area of dissemination of pornography, said:

> "It is not for this Court thus to limit the State in resorting to *various weapons in the armory of the law*. (Underscoring ours.) Whether proscribed conduct is to be visited by

a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice."

Mugler v. Kansas, 123 U.S. 623 (1887) involved Kansas' first prohibition laws and, among others, a section providing "All places where intoxicating liquors are. . . . sold. . . .are declared to be common nuisances and upon the judgment of any court. . . . finding such place to be a nuisance under this section, the sheriff. . . . shall be directed to shut up and abate such place. . . ." The place involved had been the subject of liquor sales. The Court, in upholding the constitutionality, said:

"The State, having authority to prohibit the. . . . sale of intoxicating liquors. . . . we do not doubt her power to declare any place kept and maintained for the illegal manufacture and sale of such, shall be deemed a common nuisance and to be abated, and, at the same time, to provide for the indictment and trial of the offender. *One is a proceeding against the property used for forbidden purposes*. . . . The statute does not put the brand of a common nuisance upon any *place*, unless. . . . *that place* is kept and maintained for purposes declared by the legislature to be injurious to the community." (Underscoring ours.)

The padlocking provision of the Ohio statute is a time honored remedy involving the place - it is not censorship or prior restraint.

A proposed order, consistent herewith, may be presented, dismissing the complaints, except for the Monte Vista case - 8471. (A case similar in every respect to Monte Vista is pending in the Supreme Court on appeal from the Northern District of Ohio, and the Monte Vista case will remain in status quo pending the determination of that appeal.)

JOHN W. PECK
Circuit Judge

DAVID S. PORTER
District Judge

TIMOTHY S. HOGAN
District Judge

APPENDIX B.

Memorandum Opinion.

United States District Court, Central District of California.

Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, v. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. Civil No. 73-2775-F.

Filed: June 4, 1974

Before: Honorable Walter Ely, Circuit Judge, Honorable William G. East, and Honorable Warren J. Ferguson, District Judges.

PER CURIAM.

The primary issue presented is whether the California obscenity statute as interpreted by the state courts of California meets the constitutional standards mandated by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973). We hold that it does not.

The facts which give rise to the litigation are as follows:

1. On November 20, 1973, anticipating that the movie "Deep Throat" would be exhibited in the City

of Buena Park, in Orange County, California, three members of the Buena Park Police Department traveled to nearby Los Angeles County and there viewed the film in its entirety.

2. On November 21, 1973, an affidavit and warrant were prepared describing the film, and arrangements made for a judge of a Municipal Court to view the film if it was brought to Buena Park.

3. At 12:30 p.m. on November 23, 1973, the officers, a deputy district attorney and the judge attended a showing of the film at plaintiff's theatre in Buena Park.

4. After viewing about 45 minutes of the film, they retired to the sidewalk in front of the theatre, where the judge was presented with the previously prepared documents.

5. A photographer hired by the theatre began photographing the judge and the officers while they reviewed the papers. One of the officers, acting on orders from the judge, stopped the photographer from taking any more pictures and seized the film in his camera.

6. The search warrant was issued, and the officers seized the movie and posters advertising it. In describing the property to be seized, the warrant also contained the following handwritten addition:

> "Money contained in the ticket booth & specifically for a $20.00 bill Ser. # B08574869B."

All the cash in the box office was seized, an amount shown to be $305.00.

7. That afternoon the theatre obtained another copy of the film for exhibition. At 3:00 p.m., the same police officers again viewed the film, and left to get another warrant. The affidavit accompanying the sec-

ond warrant was an identical copy of the first, but also contains the following handwritten notation:

> "Your affiant further states that said film was seized on Nov. 23, 1973 at approx. 1:30 p.m. after being viewed by Judge ..... with the exception of certain portions being edited different than the first film seized.
>
> Your affiant states that this copy of the film 'Deep Throat' consists of (1) one additional act of sexual intercourse and numerous small changes at different portions of the film."

8. The same Municipal Court judge signed the second warrant without seeing the film again, and the officers returned to the theatre at 4:30 p.m. Another copy of "Deep Throat" was seized, along with some advertising posters.

9. The typed second warrant was also an identical copy of the first, but contained the following handwritten addition in describing the property to be seized: "Money contained in the ticket booth cash drawer." $159.00 in cash was seized from the box office.

10. The theatre obtained yet another copy of "Deep Throat." At 7:45 p.m. the same day, the same officers again returned to the theatre and viewed the film in its entirety. They then contacted the judge, who signed another search warrant at 9:00 p.m. The affidavit in support of the warrant was identical to the first and second, but contained the following handwritten notation:

> "Your affiant states that said film was seized on Nov. 23, 1973 at approx. 1:30 p.m. and 4:35 p.m. after being viewed by the Honorable Judge .... who issued a search warrant.

Your affiant states that the film in question is the same film viewed by Judge ..... with the exception of certain portions of the film being edited differently than the film viewed by the Honorable Judge ....

Your affiant states that this copy of the film 'Deep Throat' consists of (1) one additional act of sexual intercourse not shown in the copy viewed by Judge ..... and numerous small changes at different portions of the film."

11. The judge decided he wished to view the film again, and returned with the officers to the theatre at 9:15 p.m. He ordered the officers to execute the warrant, and a third copy of the film was seized.

12. The third warrant was identical to the first and second warrants, but also contained this handwritten notation, describing the property to be seized: "All monies on premises received, in cash drawers or safes at above location." The officers brought a locksmith to the theatre, who opened the business' safe. Money from the cash drawer and the safe totaling $4,082.33 was seized.

13. At 2:30 p.m. the following day, the same officers turned over all the seized items to the judge at his home, and advised him that they believed the movie was going to be shown again.

14. The officers went to the theatre and viewed the film. They returned to the judge's home with another of the identical affidavits, with the same handwritten notation. At 4:00 p.m. the judge signed a search warrant identical to the first three from the day before, with an additional handwritten entry describing the property to be seized: "All monies received, in cash drawers or safes."

15 The warrant was served, and another copy of "Deep Throat", some promotional posters and $197.18 in cash were seized.

16. The theatre ceased exhibition of the movie, closed until November 26, 1974, and thereafter began showing another film.

Plaintiffs in this action are the theatre owner, his property-holding company, and the theatre corporation itself. No criminal complaints are pending against any of them.

Defendants are the District Attorney of the County of Orange, a deputy district attorney, the Chief of Police of the City of Buena Park, and three officers of the Buena Park Police Department.

Plaintiffs filed this lawsuit, basing jurisdiction on 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 1983. In their complaint they seek the return of the motion picture prints seized by defendants, as well as their cash proceeds. In addition, plaintiffs also seek a declaratory judgment under 28 U.S.C. § 2201 and 2202 that California Penal Code §§ 311, 311.2 and 311.5[1] are unconstitutional.

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[1] § 311. *Definitions*

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representations of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is

(This footnote is continued on next page)

Plaintiffs here have no prosecutions pending against them, and have made no allegations that any are

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designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

§ 311.2 *Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state*

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

§ 311.5 *Advertising or promoting sale or distribution; solicitation.*

Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented or held out by him to be obscene, is guilty of a misdemeanor.

threatened. However, it is clear that they do present a real and actual controversy, and do have standing to challenge the constitutionality of the California obscenity statute, since defendants have seized and continue to hold property of the plaintiffs, property which was seized solely because of alleged violations of the California obscenity statute. The Supreme Court has expressly held that a federal court's jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 is not diminished by any distinction between personal and property rights. See *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

The Obscenity Statute
Abstention

The validity of the California obscenity statute (California Penal Code § 311, et seq.) was not determined by the Supreme Court in *Miller v. California, supra.* The Court, in determining a definition of obscenity which falls outside the protection of the First Amendment, permitted judicial construction of obscenity statutes so that even though the statute on its face violated *Miller*, it may fall within *Miller* by judicial construction. Obviously in *Miller* the Supreme Court did not have the benefit of such construction.

However, since *Miller*, the California courts have authoritatively construed the California statute with regard to *Miller.*

In *People v. Enskat*, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), *hearing denied* by the California Supreme Court October 24, 1973, the California Court of Appeal determined that the California statute meets the test of *Miller.*

The defendants assert that *Enskat* is now the law in California. *Auto Equity Sales Inc. v. Superior Court*, 57 Cal. 2d 450 (1962) makes it clear in California that the decision rendered by the California Court of Appeal, Second District, Division Five in *Enskat* is ". . . binding upon all the justice and municipal courts and upon all the superior courts of this state, *id.* at 455. Likewise, although a denial of hearing by the California Supreme Court ". . . is not to be regarded as expressing approval of the propositions of law set forth in the opinion of the District Court of Appeal or as having the same authoritative effect as an earlier decision of [the California Supreme Court], [citations], it does not follow that such a denial is without significance to [that Court's] views," *Di Genova v. State Board of Education*, 57 Cal. 2d 167, 178 (1962). A denial of hearing ". ... stands, therefore, as a decision of a court of last resort in this state, until and unless disapproved by [the California Supreme Court] or until change of the law by legislative action." *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 306 (1963), quoting from *Cole v. Rush*, 45 Cal. 2d 345 (1955). See also *Klingebiel v. Lockheed Aircraft Corp.*, ... F. 2d .... (9th Cir. Feb. 20, 1974), Slip Opinion at p. 2 n. 2, citing *Stover v. New York Life Insurance Co.*, 311 U.S. 464 (1940). Thus, any defense in state court that the statute is defective under the Federal Constitution would be precluded.

In *Younger v. Harris*, 401 U.S. 37 (1971) and *Samuels v. Mackell*, 401 U.S. 66 (1971), the Supreme Court recognized that principles of equity, comity and federalism necessarily limited a federal court's power to issue an injunction or a declaratory judgment when a state prosecution was pending. In *Steffel v. Thomp-*

son, ... U.S. .... (March 19, 1974), however, the Court made it clear that neither *Younger* nor *Samuels* governed the situation in which there was no pending state prosecution. When, in that instance, the relief sought is declaratory in nature, and jurisdiction is based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), the federal courts have been assigned a "paramount role" in protecting constitutional rights. *Steffel*, Slip Op. at 20.

The situation presents no danger of "duplicative proceedings or disruption of the state criminal justice system," *Steffel* at 9. The role of the federal court is unaffected, whether the attack is to the statute on its face or as applied, *Steffel* at 20-22. Here, the California statute is alleged to be facially invalid, but the decision in *Miller v. California, supra*, requires this court to pay due regard to the state judicial interpretation of the state as well. Finally, the fact that there may be related pending criminal prosecutions against some of the theatre employees does not affect this plaintiff's right to declaratory relief. *Steffel* at 18 n. 19. No barriers exist to prevent this court from examining the merits of plaintiff's claim.

Constitutionality

In *Miller*, the standards that state obscenity statutes must meet to comply with the First Amendment are:

(1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

The Court stated, "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the states through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 413 U.S. at 25.

The issue presented is whether the California statute "as written or construed" specifically defines proscribed sexual conduct. The Court in *Miller* for the first time in its long struggle to define that obscenity which is outside the protection of the First Amendment, adopted a Fifth Amendment fair notice rule. It has long been an established rule of Due Process that no person may be subject to criminal prosecution without "fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617 (1954); see also *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

Miller states "We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

It is clear that the California statute on its face does not meet the sound test of *Miller*, since it does not specifically define the sexual activity which is prohibited. As it reads, there is no fair notice what California permits or prohibits.

There is dispute among law enforcement officials whether the legislature of California could ever draft a statute which meets the test. The County Counsel for

the County of Los Angeles in another case pending before this court has stated:

> "The argument of the plaintiff requiring specifically enumerated sexual activity in order to make the obscenity statutes constitutional, must fail because legislatures can't be expected to enumerate and define every possible activity about a perversion known to humans regarding sexual activity. Under the maxim of expression unius est exclusio alterius, plaintiffs' argument would allow certain obscene sexual conduct to be exhibited if it was inadvertently omitted by the Legislation." (*Monica Theater, Inc., et al. v. Evelle J. Younger, et al.*, Case Number 70-2167-ALS. Defendant's Brief, filed November 30, 1973 at p. 2.)

The Court in *Miller* recognized the concern expressed here by Los Angeles' Deputy County Counsel when it stated "'. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .'" 413 U.S. at 27, n. 10.

The California Court of Appeal in *Enskat* impliedly conceded that the statute as written does not meet *Miller*. It stated, however, that the statute has been authoritatively construed in the past so as to limit its reach to specifically defined sexual conduct. (At least one federal court has declined to consider the validity of a state obscenity statute solely on the basis of past state cases without the benefit of a post-*Miller* state court analysis. *United Artists Corp. v. Harris*, 363 F. Supp. 857 (W.D. Okla. 1973).) Given the particularities that the California statute is missing on its face, it may be that such an undertaking would go beyond

the pale of judicial construction and cross over into the realm of legislative drafting. For the moment, however, this court need only address itself to the judicial construction put forth in *Enskat*.

In reaching their conclusion the state court cited *Zeitlin v. Arnebergh*, 59 Cal. 2d 901 (1968); *People v. Noroff*, 67 Cal. 2d 791 (1967); *People v. Cimber*, 271 Cal. App. 2d Supp. 867 (1969); and *Landau v. Fording*, 245 Cal. App. 2d 820 (1966). While reference was made in at least two of those cases to sexual acts there involved, none of the state court opinions attempted to delineate standards of obscenity based on specific conduct.

The analysis of those cases that emerges in *Enskat* is that: (1) only "hard core pornography" is prohibited; (2) nudity, absent a sexual activity is not obscene; and (3) the material must contain a "graphic description of sexual activity." It is clear that the "fair notice" test of *Miller* is not met.

The term "hard core pornography" is no more precise than the term "obscenity." *Jacobellis v. Ohio*, 378 U.S. 184 at 201 (1964).

Likewise the mere language "graphic description of sexual activity" does not meet the specificity test. The Court stated "as a result, we now confine the permissible scope of such regulation to words which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable state law*, as written or authoritatively construed." *Miller* at 24 (emphasis added). In order to comport with due process, the criminal obscenity statute here must give fair notice of what conduct is criminally proscribed, *United States v. Harriss, supra*, and the Supreme Court in *Miller*, by out-

lining its criteria for "obscenity", has authoritatively indicated what a statute, in its language or its judicial construction, must have to be constitutional. *Enskat* and the cases cited therein have not supplied a description of specific sexual conduct "as definitely as if it had been so amended by the legislature", *Winters v. New York*, 333 U.S. 507, 514 (1948). *Cf. Beauharnais v. Illinois*, 343 U.S. 250, 254 (1952).

In addition to those cases cited by the Court of Appeal in *Enskat*, *People v. Sarong Gals*, 27 Cal. App. 3d 46 (1972); *People v. Adler*, 25 Cal. App. 3d Supp. 24 (1972) and *Dixon v. Municipal Court*, 267 Cal. App. 2d 789 (1968) have been brought to the court's attention as bearing on the construction of § 311. *Sarong Gals* involved a civil suit, an in rem action brought under the Red Light Abatement Act, California Penal Code §§ 11225-11235, and the construction of the statutory term "lewdness'; that case is inapplicable to the issues here. *Dixon* involved the lifting of a writ of prohibition and a remand to the municipal court, holding that the fact that there may have been "simulation" of sexual acts did not bar a finding of obscenity as a matter of law. As the Court there noted, however: ". . . [in] the case before us, we do not have testimony of what was actually done, because prosecution was barred by the writ." 267 Cal. App. 2d at 793. *Adler*, like some of the cases cited in *Enskat*, makes a passing and somewhat vague reference to sexual acts described in the book that was the subject of the action. As with all the cases referred to, however, there is no attempt by the courts of the State of California to formulate a standard of obscenity or a rule of law based upon those specific acts therein mentioned, or upon *any* specific acts.

The California Court of Appeal, in deciding *Enskat*, also noted that the statute as presently written imposed "more strict requirements on the prosecution as to the definition of obscenity", because it retains the "utterly without redeeming social value" or *Memoirs* test which the Supreme Court disavowed in *Miller*. The California Court of Appeal correctly noted that imposing more strict standards on the government than are required by the Constitution would not make a statute unconstitutional. From that proposition, however, the state court then derived a decision of questionable logic: since the Supreme Court obviously intended to make it "easier" to prosecute obscenity cases after *Miller*, and since it is harder to meet the California standard of "*utterly* without redeeming social value" than it is to meet the new test of "lacks serious literary, artistic, political, or scientific value", then the state is not bound to "require increased specificity" in the law. *Enskat* at 911. This "trade-off" argument is particularly specious. First, the social value test is only one portion of the overall standard developed by the Supreme Court; isolating one portion of the test cannot cure the defects of the whole test. (It is clear that there can be "sexual activity" which is utterly without redeeming value which is so innocuous as to not be included on a list enumerated by a legislature.) Secondly, the zealous inquiry into the "intent" of the Supreme Court reveals nothing that would justify the contention that it is now supposed to be "easier" to convict purveyors of sexually-oriented materials. The Court in *Miller* set forth important First and Fifth Amendment principles central to a fair and reasoned system of criminal law, and not a statement of disapproval of works with a sexual theme.

Finally, it has been suggested that footnote 7 in *United States v. 12 200-foot Reels of Film*, 413 U.S. 123 (1973) permits the type of construction urged upon the court today. If the Supreme Court by that passing reference was announcing new boundaries for the legislative and judicial domains, it is clear that it at best applies only to the particular power the Supreme Court has to construe federal statutes. Without more, that narrow statement can be of no relevance to this determination. For the example of another court unwilling to construe this footnote as an invitation to repose legislative power in the judiciary, see the opinion of the Louisiana Supreme Court in *Louisiana v. Shreveport News Agency, Inc.*, 42 U.S.L.W. 2344 (Jan. 8, 1974).

In summary, we find (1) the California obscenity statute as written does not meet the specificity test of *Miller* and (2) the California courts, in interpreting the statute may have liberalized it beyond its wording but have not specifically construed it so as to give fair notice as to what is constitutionally prohibited.[2]

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[2]This finding comports with the following decisions which have held the statutes in other states not to comply with the mandate of *Miller:*

New Jersey
Hamar Theaters, Inc. v. Cryan, 13 Cr.L. 2449, United States District Court for the District of New Jersey (July 26, 1973).

Massachusetts
Commonwealth v. Horton, Commonwealth v. Capri Enterprises, Inc., and *Essex Theatre Corp. v. Police Commissioner of Boston*, Massachusetts Supreme Judicial Court (April 23, 1974).

Louisiana
Louisiana v. Shreveport News Agency, Inc., 42 U.S.L.W. 2344, Louisiana Supreme Court (January 8, 1974).

Iowa
State v. Cahill and Wedelstadt (No. IM2-261), District Court, Linn County, Iowa (August 13, 1973).

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Injunctive Relief

In addition to the prayer for declaratory relief regarding the constitutionality of the statute, plaintiffs seek injunctive relief requiring the return of their seized property. In *Steffel* the Court held that requests for injunctive and declaratory relief must not be treated as a single issue.

Since there are no allegations that criminal prosecutions are pending or threatened, plaintiffs have not asked this court to stay any state criminal actions. It was that sort of injunctive relief with which the Supreme Court was faced when formulating rules of abstention in *Younger v. Harris, supra, Samuels v. Mackell, supra,* and *Perez v. Ledesma,* 401 U.S. 82 (1971).

Plaintiffs here merely seek the return of their seized property. Although equitable in nature, that relief is markedly different from an order which would force a state criminal court to stay its proceedings. While requiring the state to return four copies of the film and approximately $5,000 in gate receipts might have some disruptive influence on a possible future prosecution, or upon prosecutions of others, it is less harsh an interference than a direct injunction against a state proceeding. Nevertheless, for purposes of this analysis, this court will treat this prayer for injunctive relief as any other.

Cases of this sort can often involve dual requests for both injunctive and declaratory relief. See, for example, *Perez v. Ledesma, supra* (separate opinion of Brennan, J.). *Younger v. Harris* addressed itself solely to a rule

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North Carolina
State v. Bracken (72 CR 26502) and *State v. Cox* (72 CR 26503), Superior Court in Greensboro, North Carolina.
Indiana
Stroud v. Indiana (570 S 107) and *Mohney v. Indiana* (471 S 94), Supreme Court of Indiana (August 21, 1973).

for injunctive relief when a prosecution was pending. In *Samuels v. Mackell,* plaintiffs sought declaratory relief when a prosecution was similarly pending. The recent case of *Steffel v. Thompson, supra,* formulated standards for declaratory relief when no prosecution was pending, but specifically declined to rule on whether injunctive relief is appropriate in such an instance. *Id.* at 10. This court is now faced with that situation in which the Supreme Court has yet to act.

The perimeters of such a rule of law are still unclear; whether the strict doctrine of *Younger* would apply or not when there is no pending prosecution has been seriously questioned. See Note, Implications of the *Younger* Cases for the Availability of Federal Equitable Relief When No State Prosecution Is Pending, 72 Colum. L. Rev. 874 (1972) at 895 and cases collected therein. At least one court has indicated that federal relief is more appropriate when, as here, the state statute is attacked on its face. *Jones v. Wade,* 479 F.2d 1176 (5th Cir. 1973) (Wisdom, J.).

Those questions, however, are of only minor importance to this court, since all the elements necessary for injunctive relief under *Younger* are present here. First, the question of whether these plaintiffs have standing and present a justiciable controversy has already been discussed. This court need only reiterate that defendants are now holding a significant amount of money in which plaintiffs claim a present property right. Second, the posture of § 311 as construed by the California courts is such that it is unlikely the injury could be remedied by a defense in a criminal prosecution. The admonition of abstention in *Younger v. Harris* must be viewed in light of the fact that the statute involved there (the California Syndicalism Act) had never been reviewed by the state courts since the Su-

preme Court had overruled *Whitney v. California,* 274 U.S. 357 (1927) by its decision in *Brandenburg v. Ohio,* 395 U.S. 444 (1969). A defendant then faced with a prosecution for violating that Act could have set up a defense based upon the unconstitutionality of the statute.

By way of contrast, the California obscenity decision has been finally reviewed in the light of *United States v. Miller.* The construction of § 311 rendered in *Enskat* has effectively foreclosed relief in the state courts.

Finally, the objective facts set forth in the first part of this opinion clearly demonstrate bad faith and harassment which would justify federal intervention. Any editorializing of those facts would serve no purpose. It is sufficient to note that the pattern of seizures of the plaintiffs' cash receipts and films demonstrate that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effective exorcise the movie "Deep Throat" out of Buena Park.

The gravamen of the defendants' justification is, of course, that the property is contraband, both the evidence and the fruit of an illegal activity. Such a justification, however, dissipates in the face of a declaration by this court that the statute is invalid.

Pursuant to the provisions of Rule 52(a) this opinion shall constitute the findings of fact and conclusions of law of the court.

Pursuant to the provisions of Rule 58 a separate judgment shall be prepared and entered which shall provide as follows:

1. The California obscenity statute, Penal Code Sections 311 *et seq.*, are in violation of the mandate of the United States Supreme Court as set forth in *Miller v. California*, 413 U.S. 15 (1973).

2. The defendants shall return to the plaintiffs the property seized from the plaintiffs on November 23 and 24, 1973, in the City of Buena Park, California.

3. The court retains full and complete jurisdiction over the parties and the causes of action for all purposes.

4. Plaintiffs are entitled to their costs.

DATED: June 4, 1974.

WALTER ELY
United States Circuit Judge

WILLIAM G. EAST
United States District Judge

WARREN J. FERGUSON
United States District Judge

Separate Judgment Pursuant to Rule 58 of the Federal Rules of Civil Procedure.

United States District Court, Central District of California.

Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, v. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Rich-

ard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. Civil No. 73-2775-F.

Filed: June 4, 1974.

Before: Honorable Walter Ely, Circuit Judge, Honorable William C. East, and Honorable Warren J. Ferguson, District Judges.

The court having heretofore issued its memorandum opinion, said opinion constituting its findings of fact and conclusions of law in accordance with the provisions of Rule 52(a) of the Federal Rules of Civil Procedure,

IT IS DECREED as follows:

1. The California Obscenity Statute, Penal Code Sections 311 *et seq.*, are in violation of the mandate of the United States Supreme Court as set forth in *Miller v. California*, 413 U.S. 15 (1973).

2. The defendants shall return to the plaintiffs the property seized from the plaintiffs on November 23 and 24, 1973, in the City of Buena Park, California.

3. The court retains full and complete jurisdiction over the parties and the causes of action for all purposes.

4. Plaintiffs are entitled to their costs.

DATED this 4th day of June, 1974.

WALTER ELY
United States Circuit Judge

WILLIAM G. EAST
United States District Judge

WARREN J. FERGUSON
United States District Judge

C-1

No. 73-1660

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STATE OF OHIO, EX REL LAWRENCE S. HUFFMAN, Plaintiff-Appellant,	Filed Oct. 22, 1974
	John P. Hehman, Clerk
v.	ORDER
WILLIAM H. DAKOTA, ET AL., Defendants-Appellees.	

It appearing to the Court that Appellant having heretofore been ordered to show cause why this appeal should not be dismissed for want of prosecution, and it further appearing that good cause has been shown,

IT IS ORDERED that the show cause order be and it hereby is discharged.

IT IS FURTHER ORDERED that, upon consideration of the Plaintiff-Appellant's motion for a continued stay of proceedings in this Court pending disposition by the United States Supreme Court in case No. 73-296, Lawrence S. Huffman, et al. v. Pursue, Ltd., the motion be and it hereby is granted.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman, Clerk

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. CECIL HICKS, DISTRICT ATTORNEY OF ORANGE COUNTY,

Plaintiff and Respondent, 4 Civil 13235

v. (Sup.Ct.No. 179982)

"SARONG GALS," Et Al.,

Defendants and Appellants. OPINION

APPEAL from a judgment of the Superior Court of Orange County. Byron K. McMillan, Judge. Affirmed.

Hecht, Diamond & Freis and Roger Jon Diamond for Defendants and Appellants.

Cecil Hicks, District Attorney, Michael R. Capizzi and Oretta D. Sears, Deputy District Attorneys, for Plaintiff and Respondent.

"Sarong Gals," Seemaygro, Inc. ("Seemaygro") and Norma Groat appeal from a judgment which permanently enjoined them and any other person from maintaining, using or occupying the premises known as Sarong Gals for the purpose of lewdness and which closed the premises to all uses for one year except for uses not involving entertainment or use of a Department of Alcoholic Beverage Control license.

The underlying facts of this case are set forth in our prior opinion, *People ex rel. Hicks v. Sarong Gals*, 27 Cal.App. 3d 46, where we held that the Red Light Abatement Law

(Pen. Code, §11335, et seq.)[1] may be used to abate continuing acts of lewdness sans evidence of prostitution and that the entertainment described in the instant case is lewd and not afforded the protection of freedom of speech under the First Amendment. We thus affirmed the trial court's order denying dissolution of a preliminary injunction, but modified the injunction so as to strike that portion enjoining the defendants from conducting any performance in which the performer's genitalia or anus were visible to any other person under the stricture of *In re Giannini*, 69 Cal.2d 563.

Norma Groat is the sole shareholder, vice president and secretary of Seemaygro. Seemaygro was the lessee and operator of Sarong Gals, a beer bar licensed by the Department of Alcoholic Beverage Control.[2]

By stipulation at trial, it was agreed that if certain police officers were called as witnesses, they would testify to the facts contained in affidavits[3] previously filed in support of the request for a preliminary injunction.[4] It was also stipulated that Officer Salazar, a qualified expert, if called as a witness, would testify that the conduct described in the affidavits, taken as a whole, goes substantially beyond the limits of candor of the community of the State of California. It was further stipulated that Dr. Blair McLaughlin, if called as a witness, would testify that the described conduct in his expert opinion is matter in which, taken as a whole, the predominant appeal is to prurient interests, that is, to abnormal interest in sex, nudity and excretion of the average person in the State of

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[1] Penal Code, section 11225 reads:

"Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated and prevented, whether it is a public or private nuisance. ....."

[2] Defendant Grover Thompson, the owner of the premises, does not appeal from the judgment.

[3] The affidavits detailed 46 incidents of lewd entertainment over a period of nine months.

[4] These facts are reported in People ex rel. Hicks v. Sarong Gals, supra, 27 Cal.App.3d at pp. 48-49.

California.

CONTENTIONS

Appellants essentially contend: (1) that there is no evidence to support material findings of fact; (2) that the nuisance was voluntarily abated and that no evidence was presented to establish that the nuisance was continuing at the time the complaint was filed; (3) that the abatement order violates the First Amendment.

DISCUSSION AND DISPOSITION

The power of an appellate court, when a finding is attacked on the basis that it is not supported by substantial evidence, is limited to the determination whether there is any substantial evidence to support the finding; the reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact. (*Foreman & Clark Corp. v. Fallon*, 3 Cal.3d 875, 881.) All factual matters are viewed most favorably to the prevailing party and in support of the judgment. (*Nestle v. City of Santa Monica*, 6 Cal.3d 920, 925.) All legitimate and reasonable inferences are indulged in to uphold the findings of the trial court. (*Estate of Bristol*, 23 Cal.2d 221, 223.)

Appellants argue that no evidence was presented to show that Seemaygro and Norma Groat had personal knowledge of the incidents described in the declarations. This argument tests the credulity of the court. Seemaygro was the lessee of the premises and the operator of Sarong Gals. Norma Groat is the sole shareholder of Seemaygro and is also its vice president and secretary. From these circumstances it would be reasonable to infer that Norma Groat and Seemaygro had personal knowledge of the activities taking place upon the premises. Taking judicial notice of the record in the prior appeal (see Evid. Code, §§452, 459), appellants admitted in their answer to the complaint that Seemaygro presented nude entertainment at the Sarong Gals. Moreover, a showing of personal knowledge on the part of the owner or operator of the premises is not a prerequisite to relief under the Red Light Abatement Law. (*People v. McCadden*, 48 Cal.App. 790,792;

People v. Bayside Land Co., 48 Cal.App. 257, 261; *People v. Peterson*, 45 Cal.App. 457.)

Appellants also argue that there was no evidence introduced to show that Norma Groat presented the complained of entertainment. We do not agree. Norma Groat is the sole shareholder of Seemaygro. She is also vice president and secretary. From her position in the company, the trial court could infer that she was in control of Seemaygro, and that the corporate acts of Seemaygro were performed under her direction. Moreover, the People introduced evidence at the trial showing that lewd entertainment was being presented during the time Norma Groat was the active manager of the Sarong Gals.

Appellants further argue that no evidence was presented to support the court's finding that "(t)he common fame and general reputation of the 'Sarong Gals' is that it is a place kept (,) conducted and maintained for the purpose of lewdness and the common fame and general reputation of the occupants thereof and frequenters thereto is that of lewd persons." Although no testimony was presented at the trial as to the common fame and reputation of the Sarong Gals, the trial court could infer from the series of affidavits of the officers relating the activities taking place at the Sarong Gals over a period of months that by common fame and reputation the Sarong Gals is a place maintained for the purpose of lewdness and the occupants and frequenters thereof are lewd persons. Such a showing, however, was not necessary to the judgment. The statute, by its terms, only requires that lewd acts occur on the premises. While the common fame and reputation of the premises may be circumstantial evidence that such acts have occurred, such a showing is not necessary where, as here, numerous specific acts have been documented.

II.

Appellants next contend that the order of abatement was invalid because the nuisance had been abated. In support of their contention, they argue that no evidence was presented to establish violations of lewd conduct or obscenity statutes

after December 15, 1970. The contention is without merit.

In the first place, evidence was introduced at the trial reporting a performance at the Sarong Gals on or about January 3, 1973, less than two weeks before the trial date, from which the trial court could conclude that the nuisance was continuing.

In the second place, once the People presented evidence to show that lewd acts had taken place at the Sarong Gals, it was incumbent upon appellants to present evidence showing that the nuisance had been abated. (*See People v. Goddard*, 47 Cal.App. 730, 734; *People v. Macy*, 43 Cal.App. 479, 483; *People v. Dillman*, 37 Cal.App. 415, 419-420.) It is a maxim of jurisprudence that "(a) thing continues to exist as long as is usual with things of that nature." (Civ. Code, §3547.) Appellants' reliance on *People v. Goddard*, supra, is misplaced. In *Goddard*, there was clear and uncontradicted evidence to show that the persons occupying the premises for immoral purposes vacated the premises three days before the filing of the complaint. No similar showing was made here.

III.

Appellants contend that, in view of our prior decision, the People were only entitled to obtain a permanent injunction as broad as that of the preliminary injunction. Appellants in essence argue that since our prior opinion concluded that "the prohibition of nude dancing of any sort is directed to protected expression," the court is precluded from granting a permanent injunction precluding nude dancing. We do not agree.

Our decision striking part "c" of the preliminary injunction – enjoining defendants from conducting any performance in which the performer's genitalia or anus were visible to any other person – was compelled by *In re Giannini, supra*, 69 Cal.2d 563, which held that "topless" dancing is conduct protected under the First Amendment. The Supreme Court, however, in a recent opinion overruled *In re Giannini*. (*Crownover v. Musick*, 9 Cal.3d 405, 431.) In so doing, it nullified that portion of our prior opinion which rested on *In re Giannini*. (See 6 Witkin, Cal. Procedure (2d ed.) pp. 4568-4570.)

Appellants finally contend that the abatement order is overbroad and impinges upon their First Amendment right to present non-lewd dancing exhibitions at the Sarong Gals. Of course, just as a court order for the incarceration of a convicted lawbreaker impinges on all sorts of constitutional rights, so does the abatement order. The order shutting down the property except for limited uses is specifically authorized, however, by Penal Code, section 11230 which permits the "closing of the (offending) building . . . against its use for any purpose . . . for a period of one year, ..." The question is, therefore, not whether the order impinges on constitutionally guaranteed rights, but whether the statute constitutes a permissible exercise of the state's police power. *(Cf. Consolidated Rock Products Co. v. City of Los Angeles*, 57 Cal.2d 515, 530.)

The purpose of Red Light Abatement proceedings is to abate a nuisance. Abatement of nuisances is a long established and well recognized exercise of the state's police power. *(Board of Supervisors v. Simpson*, 36 Cal.2d 671, 675; *People v. Casa Co.*, 35 Cal.App. 194; *People v. Barbiere*, 33 Cal.App. 770, 775-776.) The provision in Penal Code, section 11230 authorizing closing of the offending property to all uses for a period of one year, while harsh, is constitutionally permissible. The Legislature could, and presumably did, consider the alternative of constant police surveillance of the offending premises too burdensome to the community. It is to be remembered that Red Light Abatement proceedings are directed against the offending property itself. Their purpose, it has been said, "is to effect a reformation in the property itself." *(People v. Bayside Land Co., supra*, 48 Cal.App. at p. 261.) Thus, while appellants are arguably denied their right of First Amendment expression to some extent, they are denied such right only upon the specific property here involved and only for a limited period of time. They are in the meantime free to exercise their First Amendment rights at any other place. Moreover, appellants' restricted First Amendment rights are penumbral at best. The right to present non-lewd dancing for commercial purposes in a beer bar is hardly to be equated with the right to hold a town hall meeting. *(See Crownover v. Musick, supra*, 9 Cal.3d at pp. 424-426.) Thus, the interference

with appellants' right to free expression is limited and easily overbalanced by the state's substantial interest in abating public nuisances.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

/s/ Kaufman
J.

I concur:

/s/ Gardner
P.J.

I dissent.

The abatement order directing the sheriff to remove all the fixtures, equipment and musical instruments from the subject property and to close the building so as to deprive the owner and lessee of any use thereof for any purpose for a period of one year constitutes a flagrant violation of the First Amendment.

The Red Light Abatement Law states that any place used for the purpose of illegal gambling, assignation, or prostitution is a public nuisance which may be abated. (Pen. Code. §11225.) The Act also may be used to abate continuing acts of lewdness. *(People ex rel. Hicks v. Sarong Gals,* 27 Cal.App. 3d 46, 49-50.) Once the nuisance is established to the satisfaction of the court, any movable personal property therein (including musical instruments) utilized in conducting, maintaining or abetting the nuisance may be removed and the building closed and the use thereof for the purpose prohibited for a period of one year. (Pen. Code. §11230.)

A governmental regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms are no greater than are essential

to the furtherance of that interest. (*Crownover v. Musick*, 9 Cal.3d 405, 423, 427-428, *cert. den.*, ____U.S. ____(39 L.Ed. 2d 489, 94 S.Ct. 1443).)

Although obscenity does not come within the ambit of protection afforded to speech by the First Amendment and the states remain free to regulate and suppress obscenity through the regulation of police power, the state is not free to adopt whatever procedures it pleases for dealing with obscenity without regard to possible consequences for constitutionally protected speech. (*Flack v. Municipal Court*, 66 Cal. 2d 981, 985-989.) Obviously, the owner or occupier of a building has the right to present entertainment, including dancing, provided the same is not lewd or obscene, and the government may not suppress that kind of expression.

The abatement order made herein not only bans lewdness but *all* First Amendment activities for a period of one year. Prohibiting the use of the property for any purpose amounts to over-kill. In an endeavor to cut away lewdness and obscenity, the government has deprived the owner and occupier of all rights to operate the property for legitimate purposes. (See *Weaver v. Jordan*, 64 Cal.2d 235, 245.)

It can hardly be claimed that a total ban on entertainment and other lawful use is only an incidental limitation on First Amendment freedoms. Despite the fact that the instruments and fixtures are property adaptable to use for legitimate and permissible expression, the statute authorizes removal. Similarly, the closing of the building for any purpose cannot be constitutionally sanctioned. The objective of the state of control lewd entertainment can be accomplished by a much narrower regulation. (See *Weaver v. Jordan, supra*, 64 Cal.2d 235, 245.) Section 11230 of the Penal Code should be struck down. A prior restraint on legitimate expression cannot be tolerated under the Constitution.

I would reverse that portion of the judgment which order the sheriff to sell the personal property and to close down the premises for one year.

CERTIFIED FOR PUBLICATION.

/s/ Kerrigan

J.

Weekly Variety News Report dated Oct. 16, 1974, referred to at footnote 4A, page 42.

Fed. Judge Raps Toledo 'Censors'

Toledo, Oct. 15

After Federal Judge Don J. Young denied a request for an order blocking prosecution in Toledo Municipal Court of five persons charged with presenting obscene performances (nude dancing) at The Shambles Club and the Gayety Theatre, latter in downtown Toledo, the five defendants asked for jury trials.

They had asked the Federal Court to halt prosecution, but Judge Young said the U.S. Supreme Court held that federal judges should not interfere with state court prosecutions unless there is good cause. However, he took the opportunity to say it was, in his opinion, a waste of time of the police and the courts to act as censors "when the police are having trouble coping with crime".

He said he abhorred obscenity prosecutions and believes that "this type of prosecution is an attempt to exercise tyranny over the mind of man."

There isn't anything that I have read in the Ohio statutes (against alleged obscene activities) that says you shouldn't expose your private parts in public," the judge declared. "I don't think it is very good taste to do that, but if somebody likes to do it and somebody likes to watch somebody do it, that seems to me to be a harmless occupation."

He said that he could find no good cause in the case, but agreed to the request of Harland Britz, attorney representing the Shambles, the Gayety, and also the Esquire Theatre, which plans to present nude entertainment that a three-judge panel be formed to rule on the constitutionality of the Ohio anti-obscenity law. Britz contends that the law conflicts with U.S. court holding on obscenity and that his clients are losing money and business as a result of morals squad arrests.

Los Angeles news article dated August 7, 1974, referred to at footnote 10 on page 60.

L.A. Times - August 7, 1974

Newsmakers

TEACHER SPURNS A TIE

-The choir may sing, "Blest be the tie that binds," but **Daniel Murphy**, a teacher at Mt. Carmel High School in Chicago, is in a real bind over that tie. It all began when he filed suit against the school for firing him because he refused to wear one. Murphy contended that tielessness was a symbol of rebellion against the school's restrictive policies toward women and blacks. U.S. Dist. Judge William Lynch sympathized, saying, "I'm not going to permit this man to lose his job for not wearing a tie." The judge said he would enjoin Carmel High from taking away his job but faced Murphy with a necktie party of his own. "I wear a tie," the judge said after a cravatless Murphy approached the bench." All the attorneys in court wear ties. Who do you think you are?" And, he told the hapless teacher, "If you don't come back tomorrow wearing one, I'll throw you in jail for contempt of court."